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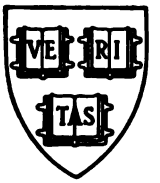

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CASES DECIDED

IN THE

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Court of Appeals and the Appellate Division of the Supreme Court

WILLIAM V. R. ERVING, REPORTER

VOLUME CXV.

1921

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8 Appointed by the Governor Jan. 12, 1921, to succeed Emory A. Chase, elected to Court of Appeals.

9 Appointed Feb. 7, 1921, in place of William H. Wadhams, resigned.

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11 Appointed Feb. 23, 1921, in place of Charles Morschauser, whose term expired.

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THE

MISCELLANEOUS REPORTS

OF THE

STATE OF NEW YORK

COMMENCING MARCH, 1921.

HOYT, etc., Plaintiff, *v.* GREAT AMERICAN INSURANCE CO., Defendant.

(Supreme Court, New York Special Term, March, 1921.)

Corporations — when stockholders entitled to a reasonable time to subscribe for a proportionate amount of increased capital stock — pleading — laches — damages.

Stockholders, in the absence of laches or acquiescence, have a vested right to take their proportionate share of an increase in the capital stock and are entitled to a reasonable time within which to subscribe therefor.

Where in an action for damages, because of defendant's failure to give plaintiff or her testator, who was the holder of certain shares of the capital stock of defendant, a reasonable opportunity to subscribe for a proportionate amount of its increased capital stock, it appears upon the face of a separate defense, in which there are no denials, that no notice whatever of the stockholders' meeting was ever sent to plaintiff's' testator, and the facts set forth in lieu thereof and as an excuse for not sending such a notice constitute neither laches nor the waiver of the vested right of plaintiff's testator to take his proportionate share of the new stock, a demurrer to the separate defense will be sustained with costs.

DEMURRER to affirmative defense to first cause of action set forth in complaint.

Fraser, Speir & Meyer, for plaintiff.

Shearman & Sterling, for defendant.

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DONNELLY, J. Demurrer by plaintiff to defendant's affirmative defense to the first cause of action set forth in complaint. This cause of action sets forth a claim for damages against the defendant in the sum of $8,662.50 arising out of the alleged failure of the defendant to give the plaintiff or her testator, who was the holder of record of thirty-five shares of the capital stock of the defendant, a reasonable opportunity to subscribe to a proportionate amount of its increased capital stock. The complaint alleges the holding of a special meeting of the stockholders on October 24, 1918, at which the stock was increased from $2,000,000 to $5,000,000, and a resolution was passed authorizing the defendant's directors to offer the increased stock to its stockholders *pro rata* at $150 per share, payable in cash, and that the defendant, pursuant to such resolution, made an offer to its stockholders on or about November 4, 1918, and that the proportionate amount of the increased stock to which plaintiff's testator was entitled to subscribe by reason of his ownership of thirty-five shares was fifty-two and one-half shares. It is also alleged that plaintiff's testator died on November 10, 1918, and that letters testamentary were issued to plaintiff on December 11, 1918; that the plaintiff's testator and his legal representatives were at all times ready, willing and able to subscribe for the said fifty-two and one-half shares of increased stock, which was worth greatly in excess of the subscription price of $150 a share, but that the defendant failed to give the plaintiff's testator and his legal representatives a reasonable opportunity to subscribe to the same, and in violation of their rights disposed of said fifty-two and one-half shares on or about December 15, 1918, to its directors, or some of them. It is also alleged in article sixth on information and belief that the plaintiff's testator received no advance notice of the stock-

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holders' meeting held on October 24, 1918, and had no knowledge that the meeting was being held and that no advance notice of the meeting was given or sent to him at his last known post office address. The answer, in addition to denials of various allegations of the complaint, contains a separate affirmative defense to the first cause of action, in which there are no denials, and which, among other things, allege as follows: "On or about October 24, 1918, the capital stock of the defendant was duly increased from $2,000,000, divided into 20,000 shares of the par value of $100 each, to $5,000,000, divided into 50,000 shares of the par value of $100 each, pursuant to a resolution duly adopted by more than a majority of the stockholders of the defendant, at a meeting of the stockholders duly held on October 24, 1918. A copy of the notice of said meeting, stating the purpose thereof, was inclosed in a sealed, postpaid envelope, addressed to Albert Sherman Hoyt, Post Office Box 250, Yokohama, Japan, which was the address of the said Albert Sherman Hoyt appearing on the books of the defendant, and the last address which he had furnished it, and was his last address known to the defendant, and was duly mailed on or about October 7, 1918. Accompanying the said notice was a circular letter to the defendant's stockholders, stating the reasons for the said increase of its capital stock, and that it was of great importance to have all the new stock issued and paid for before the end of the year 1918, and further stating that the new stock would be issued to the stockholders, in proportion to their holdings, at $150 a share, and that one-half of the purchase price would be called for in about thirty days from the time of the increase, and the remaining one-half in about sixty days. * * * At the times hereinbefore mentioned and for some time prior thereto the defendant had,

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pursuant to authorization from the said Albert Sherman Hoyt, sent checks for dividends on the stock standing in his name to the Title Guarantee & Trust Company, 175 Remsen street, Brooklyn, New York, and knowing that there would not be time for the said Albert Sherman Hoyt to exercise his right to subscribe for a proportionate part of the increased stock within the time fixed for the stockholders if the subscription warrant were sent to him at his registered address in Japan, above mentioned, the defendant sent a copy of said letter of October 25, 1918, to the said Title Guarantee & Trust Company, with a letter inquiring whether it was authorized to take any action in connection with the said subscription rights on the said stock standing in the name of Albert Sherman Hoyt. In reply to the said letter the Title Guarantee & Trust Company informed the defendant that the said Albert Sherman Hoyt had returned to America, and that his counsel in New York city, who attended to all his personal business affairs, were Steele & Otis, 25 Broad street, New York city, and that the matter should be taken up with them. The defendant fully believed that the said Steele & Otis did have charge of the personal business affairs of the said Albert Sherman Hoyt, and it accordingly sent the subscription warrants, covering the rights on the said stock standing in the name of the said Albert Sherman Hoyt, to the said Steele & Otis, on or about November 4, 1918, and asked them for instructions in regard to the exercise of the said rights, but the defendant received no instructions from them." It is conceded by both parties that it is the law of this state that an old stockholder has a vested right to take his proportionate share of the new or increased stock at par in the absence of laches or acquiescence. It is likewise conceded that a majority of the old stockholders have a

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right to fix reasonable conditions and regulations concerning an increase of stock, particularly as to time. *Stokes* v. *Continental Trust Co.*, 186 N. Y. 285; *Sommer* v. *Armor Gas & Oil Co.*, 71 Misc. Rep. 211. The only question, therefore, presented by this demurrer is whether or not a reasonable notice, or any notice whatever, of the right of the plaintiff's testator to subscribe to his proportionate share of the increased stock was ever given. It appears from paragraph 1 of the separate defense that the address of the plaintiff's testator appearing on the books of the defendant was Post Office Box 250, Yokohama, Japan. It is not alleged that any such notice was mailed to said address, or any other address specifically authorized or designated by plaintiff's testator, but in lieu thereof an excuse for not sending such a notice is set forth in paragraph 3 of said separate defense. Stockholders are entitled to a reasonable time in which to subscribe. A reasonable time was not given to the plaintiff's testator; in fact, no time at all was given to him, as it appears on the face of the separate defense that no notice whatever was sent to him, and the facts set forth in lieu thereof do not constitute laches or waiver within the meaning of *Sommer* v. *Armor Gas & Oil Co., supra.*

Demurrer sustained, with ten dollars costs.

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DAVID PERLMAN, Plaintiff, *v.* WILLIAM STELLWAGEN, Defendant.

(Supreme Court, Bronx Special Term for Trials, March, 1921.)

Encroachments — action to remove — when title to real property is unmarketable.

The title to real property is unmarketable so long as the front wall of a building erected thereon encroaches two inches upon a city street.

ACTION to remove an encroachment.

Donnelly & Kadel (James F. Donnelly and Lewis Landes, of counsel), for plaintiff.

Samuel B. Pollak, for defendant.

MULLAN, J. I find that the front wall of the building encroaches two inches upon the street, the position fixed by the surveyors called by the plaintiff; that whatever excuse a surveyor may have had for locating the line at another point the mathematical fact is controlling, and that no principle of estoppel, whether by reason of incorrect surveying for the city in street-opening proceedings or otherwise, is applicable. Furthermore, I am of the opinion that even if any of the locations so very ably contended for by defendant's counsel in his excellent argument upon that head were to be adopted the decision of this controversy would necessarily be the same as if the plaintiff's line be taken. I think it should go without saying that the doctrine *de minimis*, as relating to a comparatively trifling cost to remove an encroachment, can have no possible application to the removal of the brick fac-

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ing of the front of a substantial building. I come, then, to the more serious question whether the encroachment renders the defendant's title unmarketable. The rule formerly was that certain encroachments upon the city's streets could be disregarded upon the theory that there was no likelihood that the city authorities would disturb the encroaching owner in his possession. *Empire Realty Corp.* v. *Sayre,* 107 App. Div. 415; *Broadbelt* v. *Loew,* 15 id. 343; affd. on opinion below, 162 N. Y. 642. The doctrine of those and similar decisions, was, however, squarely and definitely overruled in *Ackerman* v. *True,* 175 N. Y. 353; *City of New York* v. *Rice,* 198 id. 124, and lastly and quite decisively, in *Acme Realty Co.* v. *Schinasi,* 215 id. 495, or perhaps it would be more correct to say that in the later cases the former rule was departed from because of the changed attitude of the city authorities toward street encroachments. The *Acme Realty Co.* decision was in a specific performance case, as this is, and it was there said that "it cannot be said that a vendor has a marketable title if his building encroaches upon the public street to such an extent as to threaten a vendee with a substantial loss in the fee and rental value of the premises and a burdensome expense in altering the building to meet the requirements of the law." The particular form of that expression of Werner, J., was doubtless due to the fact that the encroachments in that case consisted merely of architectural features, such as oriel windows, stoops and similar conveniences and embellishments. *A fortiori* would the rule of that case apply to an encroaching front wall. It apparently has yet to be decided whether any encroachment of a front wall can be regarded as negligible, no matter how small it may be. It is not clear how or where a line, necessarily arbitrary, can be drawn. If the city offi-

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cials having power in that regard should order the owners on a street to eliminate all encroachments and cut back to the street line, could the owner of a building projecting upon the street escape because his encroachment amounted only, say, to an inch? And if he were to be permitted to encroach to that extent, could an intending buyer from him feel safe from further molestation? Legislative acts, or city ordinances, might be passed for the purpose of permitting the continuance of encroachments, but at best they would be of doubtful constitutionality. See opinion of Clarke, J., in the *Acme* case at the Appellate Division, 154 App. Div. 397. Perhaps such a fractional variation as may occur between the results obtained by different and equally expert surveyors, as a tenth, or even an eighth of an inch, may properly come within the *de minimis* rule, but, in any event, I think that no such doctrine is properly applicable here. According to the plaintiff the front wall encroaches two inches. According to the defendant it encroaches from three-eighths of an inch to one-half of an inch. Reluctant as I am to fasten unmarketability upon the defendant's property, I see no means of escape from the conclusion that unless some arbitrary maximum of encroachment is to be judicially legislated into being sufficient to cover the encroachment existing here the title to the premises in question will be bad as long as the encroachment continues. The plaintiff may have judgment.

Judgment for plaintiff.

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ALBERT FLOERSHEIMER, Doing Business as THE FLOERSHEIMER COMPANY, Plaintiff, *v.* BENJAMIN SCHLESINGER, as General President of the International Ladies Garment Workers Union; ISIDOR SCHOENHOLTZ, as Treasurer of the Ladies Waistmakers Union, Local No. 25; SIDNEY ROTHENBERG, as President of the Cutters Union, Local No. 10; ISRAEL HORWITZ, Individually and as Manager of the Ladies Dressmakers Union, Local No. 22; MORRIS SIGMAN, Individually and as Manager of the New York Joint Board of the International Ladies Garment Workers Union, Defendants.

(Supreme Court, New York Special Term, March, 1921.)

Injunctions — when injunction pendente lite granted — actions — conspiracy — labor unions — pleading.

Where the complaint of a manufacturer of dresses and a member of the "Dress and Waist Manufacturers Association" clearly sets forth a good cause of action against the principal, general and local officers and certain members of the "International Ladies' Garment Workers Union," a national organization, in charging them with conspiring to cause plaintiff's factory to shut down and that they are wrongfully instigating the employees to quit work, the plaintiff upon all the facts alleged will be granted an injunction *pendente lite* as it appears that the complaint sets out a cause of action against all of the members of the union.

MOTION for an injunction *pendente lite*.

Gordon, Tally & Gordon, for plaintiff.

Morris Rothenberg (Leonard M. Wallstein and Ralph M. Frink, of counsel), for defendants.

NEWBURGER, J. Plaintiff is a manufacturer of dresses and a member of the Dress and Waist Manu-

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facturers Association. He employs about one hundred people, men and women. They consist of operators, finishers, cleaners, examiners, drapers, cutters, pressers and general utility helpers. The individual defendants are the principal, general and local officers and certain members of the defendant International Ladies' Garment Workers Union, a national organization. In January, 1913, a protocol of peace, being an agreement between the organized employers in the dress and waist industry and the defendant International Union was adopted, although a strike occurred in January, 1919, which lasted eleven weeks and which was settled by agreement between the parties on December 31, 1920; and as stated in the brief of the defendants, that when the agreement expired and no arrangement for its renewal and extension could be reached, the employees, members of the defendant union, went on strike for the purpose of prevailing on their employers to renew the agreement for collective bargaining between the employers' association and the employees' union. The plaintiff, in view of that situation, elected to conduct his business with his employees and upon the express agreement with them that during the continuance of their employment they should at all times refrain from joining or becoming members in any way or affiliated with the defendant International Ladies' Garment Workers Union or in any other union, and that written agreements with such employees were made. It is charged that the defendants have entered into a conspiracy and are conducting a strike against plaintiff's business, and causing pickets to congregate about plaintiff's factory and threatening them with physical violence and intimidating such workers, and inflicting violence upon them in visiting their homes and attempting to persuade the workers to join the defendant union, and

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threatening such workers with bodily harm if they fail to join such union; and that the defendants are attempting to carry out their plans and purposes by the use of threats, intimidation, violence and direct action. Attached to the moving papers are a number of affidavits of employees of the plaintiff showing that threats have been made by some of the defendants against them, and in a number of cases such employees were assaulted. Attached to the complaint is a copy of agreement signed by a large number of plaintiff's employees agreeing not to belong to the union. The affidavits interposed by the defendants admit that a strike has been called and, as stated therein, is to prevent the reduction of proper standards of wages, hours and sanitation in the factories, as well as to maintain such standards where they now prevail, by continuing the system of collective bargaining between the employers and the employees, and that a strike at the factory of the plaintiff is a part of the general strike. It is clear from the affidavits submitted that the strike is not for the purpose of bettering the condition of the employees, but prompted rather by fear that it might interfere with the system now in vogue of collective bargaining. This case comes clearly within the ruling of *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S. 229. In that case Mr. Justice Pitney said: "Plaintiff, having in the exercise of its undoubted rights established a working agreement between it and its employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, as in any other legal right. * * * Defendants set up, by way of justification or excuse, the right of workingmen to form unions, and to enlarge their membership by inviting other workingmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we

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assume to be true, in a general sense, with respect to the Union here in question. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 439. The cardinal error of defendant's position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others." In *Curran* v. *Galen*, 152 N. Y. 36, the court by a *per curiam* decision says: "It is proper and praiseworthy, and, perhaps, falls within that general view of human society, which perceives an underlying law that men should unite to achieve that which each by himself cannot achieve; or can achieve less readily. But the social principle which justifies such organizations is departed from, when they are so extended in their operation as either to intend, or to accomplish, injury to others. Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and if the purpose of an organization or combination of workingmen be to hamper, or to restrict, that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions, under the penalty of the loss of their position, and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in lawful employments and capacities. It would, to use the language of Mr. Justice Barrett in *People ex rel. Gill* v. *Smith* (5 N. Y. Cr. Rep., at

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p. 513), ' impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages or the maintenance of the rate.' " See, also, *Auburn Draying Co.* v. *Wardell,* 227 N. Y. 1; *Posner Co.* v. *Jackson,* 223 id. 325; *Jaeckel* v. *Kaufman,* N. Y. L. J., Oct. 13, 1920; *Piermont* v. *Schlesinger,* id. Dec. 2, 1920; *Finnegan* v. *Butler,* 112 Misc. Rep. 281; *Michaels* v. *Hillman,* 111 id. 284. The amended complaint sets forth a good cause of action. The objection thereto made by defendants that it omitted to allege, first, that the defendant union had notice of the employment contracts, is met by the allegation in paragraph 13 " that all of the workers engaged by the plaintiff were and still are employed pursuant to contracts of employment, all of which defendant union had notice of." The second objection, that it omitted to charge all of the defendants with unlawful acts complained of is untenable. See *Rourke* v. *Elk Drug Co.,* 75 App. Div. 145. It is clear from a reading of the amended complaint that it sets out a cause of action against all of the members of the union, in charging them with forming a conspiracy to cause plaintiff's factory to shut down and are wrongfully instigating his employees to quit work. The objections to the sufficiency of the amended complaint must be overruled. Upon all the facts and authorities cited the motion for an injunction *pendente lite* will be granted.

Motion granted.

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MARTIN M. DUITZ, Plaintiff, *v.* KINGS COUNTY LIGHTING COMPANY, Defendant.

(Supreme Court, Kings Special Term, March, 1921.)

Injunctions — temporary — statutes — gas companies — rates — federal courts — leave to intervene denied public service commission — Public Service Commissions Law, § 65.

While defendant, presumably pursuant to an order of the public service commission, was making a charge of ninety-five cents per 1,000 cubic feet for gas furnished to private consumers, it brought an action in a federal court against the public service commission and others with result that a decree was duly entered adjudging that both the statute (Laws of 1906, chap. 125) fixing the maximum rate at one dollar per 1,000 cubic feet and the act (Laws of 1916, chap. 604) purporting to amend the same, were unconstitutional as confiscatory and restraining the enforcement of either of said statutes. Two days after the entry of such decree defendant filed with the public service commission a schedule increasing its rate to one dollar and a half and immediately began to charge its private consumers at that rate. *Held,* that in an action to have the dollar and a half rate adjudged excessive and exorbitant, the fact in issue could not be determined upon affidavits on a motion for a temporary injunction restraining the receipt by defendant of any sum based on such rate or in excess of the ninety-five cent rate, and that plaintiff's presentation of facts did not point so clearly to his ultimate success in the action as to justify the granting of the motion. (Pp. 16, 17.)

Upon the entry of the decree in the federal court action, which by express reference thereto adjudged the invalidity of the statute of 1906, irrespective of the amendatory act of 1916, the ninety-five cent rate became ineffective and cannot be enforced as *prima facie* compensatory. There was, therefore, no legal barrier which prevented the defendant fixing a rate deemed by it to be reasonably remunerative in the absence of any rate prescribed either by the legislature or by the public service commission. (Pp. 17, 18.)

Morrell v. *Brooklyn Borough Gas Co.,* 113 Misc. Rep. 65, distinguished. (P. 19.)

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The presumption that the reasonableness of a dollar and seventeen cent rate established by a finding in the federal court action would continue for several months, was negatived and destroyed by proof of changed conditions, and defendant was also entitled to invoke the presumption that it had not violated section 65 of the Public Service Commissions Law by fixing an unreasonable rate. (Pp. 19, 20.)

Motion for an injunction granted to the extent of restraining defendant from removing its meter from plaintiff's house or shutting off the supply of gas for failure to pay the increase over the ninety-five cent rate prior to the expiration of thirty days from the date of defendant's filing its new schedule, and in all other respects denied. (P. 20.)

The court will not either directly or indirectly sanction a violation of the decree of the federal court and until an application by the public service commission for a modification of said decree is granted, its motion for leave to intervene will be denied but a motion by the city of New York for leave to intervene will be granted. (P. 21.)

MOTION for an injunction *pendente lite* and motion to intervene.

Maxwell S. Harris, for plaintiff.

Ingraham, Sheehan & Moran (Samuel F. Moran and John D. Monroe, of counsel), for defendant.

John P. O'Brien, corporation counsel (Judson Hyatt, of counsel), for city of New York.

Terence Farley and William S. Jackson, for public service commission.

ASPINALL, J. It is alleged in this action that since about the year 1914, and until October, 1920, the defendant charged for gas furnished to private consumers at the rate of ninety-five cents per 1,000 cubic feet; that on or about the 23d day of October, 1920, the defendant increased said rate to one dollar and fifty cents without giving and publishing the thirty days' notice of such change of rate as required by the

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Public Service Commissions Law; and that the gas so furnished is inferior in quality and below the standard required by statute. The relief prayed for is a decree adjudging the present rate to be excessive, exorbitant and beyond what is necessary to reasonably compensate defendant for its public service, and a permanent injunction restraining the collection of any sum based on any other than a reasonable rate. The present motion is for a temporary injunction restraining the defendant during the pendency of the action from asking, demanding or receiving any sum based on the one dollar and fifty cent rate or in excess of the previous ninety-five cent rate, and for certain other relief.

In my opinion a brief reference to certain statutes and to prior litigation is necessary to a proper consideration of the motion. By *chapter 125 of the Laws of 1906*, the legislature fixed a maximum rate, applicable to defendant, of one dollar per 1,000 cubic feet. On or about July 1, 1914, the defendant reduced its rate to private consumers to ninety-five cents per 1,000 cubic feet. Although it does not clearly so appear from the papers before me, I assume that such action by the defendant was taken pursuant to an order of the public service commission to that effect. In any event that rate continued until increased to one dollar and fifty cents as aforesaid. *Chapter 604 of the Laws of 1916* purported to amend the act of 1906 by reducing the rate to eighty cents per 1,000 cubic feet. In May, 1920, the defendant herein brought an action in the United States District Court for the Southern District of New York against the public service commission and others, with the result that on October 20, 1920, a decree was duly entered in that action adjudging that the said acts of 1906 and 1916, in so far as they limit the rate to be charged (by this defendant)

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for gas supplied by it, were confiscatory, and so unconstitutional and restraining the enforcement of either of said statutes. Thereupon, and on October 22, 1920, the defendant filed with the public service commission a schedule increasing its rate to one dollar and fifty cents as aforesaid and immediately began to charge its private consumers at that rate. Subsequently and on December 30, 1920, the public service commission moved to vacate the injunction granted in the federal action on the ground of failure to comply with the statute requiring thirty days' notice of a change of rate and on the further ground that the one dollar and fifty cent rate was excessive. The motion was denied, and in his opinion denying the motion the district judge stated that any profit represented in the one dollar and fifty cent rate was not so "grossly inequitable as to shock the conscience."

The ultimate fact in issue in this action, whether or not the one dollar and fifty cent rate is excessive, cannot be determined upon affidavits; and I do not think the facts presented by the plaintiff on this motion point so clearly to his ultimate success as to justify an injunction *pendente lite*. Had the defendant fixed a rate in excess of a rate ordered by the public service commission after a hearing pursuant to section 72 of the Public Service Commissions Law, the plaintiff would be entitled to the temporary relief sought. But the commission has made no such order since the decree in the federal action. Also, if said rate exceeded the maximum rate prescribed by any state statute, this of itself would entitle plaintiff to injunctive relief *pendente lite*. But such is not the fact. The legislature has not acted since the decree in the federal action adjudging the confiscatory character of the acts of 1906 and 1916. There is, therefore, no statutory rate obligatory upon the defendant

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at the present time. And the ninety-five cent rate established by the commission in 1914 necessarily, it seems to me, became ineffective upon the entry of the decree in the federal action. It will be noted that the act of 1916 purports to *amend* the act of 1906. Nevertheless, the decree in the federal action, by express reference thereto, adjudged the invalidity of the said act of 1906 irrespective of the amendatory act of 1916. Presumably the purpose was to avoid the contention that the invalidity of the amendatory act of 1916 revived the original act of 1906 and so re-established the maximum rate of one dollar therein prescribed. Certain it is that the form of the decree in the federal action indicated the purpose of the court to declare the confiscatory character of the one dollar rate prescribed by said act of 1906. If this be so, surely the ninety-five cent rate established by the commission cannot be enforced as *prima facie* compensatory when the one dollar rate established by the legislature itself has been adjudged confiscatory. There is, therefore, no valid rate established by statute or by the public service commission. Such being the situation, I am aware of no legal barrier which prevented the defendant fixing a rate deemed by it to be reasonably remunerative. The temporary failure in a given instance of the legislative plan for the regulation of public service corporations does not leave such corporations helpless and divested of every right and power ordinarily incident to private ownership. Rather are they thereby re-clothed with the powers necessary to effectuate their corporate purposes, freed from the restrictions of a legislative plan that has for the moment failed. In such a situation, and until a valid rate is established pursuant to law, the defendant may determine its own rate. Either this, or a chaotic condition results whereby each individual

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consumer becomes a law unto himself to fix a rate beyond which he will not pay. The case of *Morrell* v. *Brooklyn Borough Gas Co.*, 113 Misc. Rep. 65, is distinguishable. The question there involved was the validity of a rate fixed by the commission in excess of the statutory rate. It was held that the prior adjudication of the invalidity of the statute as to the defendant did not destroy the statute itself and that the commission was without power to fix a rate in excess of the rate therein prescribed. Its action in so doing was *prima facie* invalid. Moreover, the enforcement of the one dollar and forty cent rate, considered as representing the independent action of the company, was properly enjoined because in excess of the then existing rate of one dollar and fifteen cents established by the *commission*, the validity of which was not attacked in that action. But the present case involves only the question of the validity of a rate established by the defendant itself in the absence of any rate prescribed either by the legislature or by the commission.

Neither does a consideration of the facts presented by the plaintiff change my views. He emphasizes the finding of the special master in the federal action that a rate of approximately one dollar and seventeen cents would yield the defendant a fair return on its investment. This finding must be considered in light of the issue then pending. That issue was the confiscatory character of an eighty-cent rate rather than the determination of what would be a remunerative rate in the future, a determination which the court expressly refused to make or suggest. Several months have intervened since the entry of that decree. Plaintiff has added nothing to the force of that finding, and has offered no proof that the then *status quo* should be maintained. But the defendant has shown that

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since the entry of that decree it has contracted for its oil supply for six months at an increased cost of approximately twenty-five per cent, has expended upwards of $500,000 for repairs and is confronted with an increased tax rate of about one per cent. These and other facts justify a rate in excess of any rate deemed reasonable at the date of the decree in the federal action. The presumption that the reasonableness of any rate then determined would continue for the limited period of five months is destroyed by proof of changed conditions. Defendant has negatived such presumption. Moreover, the defendant is entitled to invoke the presumption that it has not violated the provisions of section 65 of the Public Service Commissions Law by fixing an unreasonable rate.

However, in view of the decision in *Public Service Commission* v. *Brooklyn Borough Gas Co.*, 189 App. Div. 62, 72, I doubt if defendant's one dollar and fifty cent rate could become effective, legally, until the expiration of thirty days from the date of the filing of its schedule. This would be on or about November 21, 1920. It fairly appears that of the balance owed to the defendant by the plaintiff, two dollars or thereabouts represents an increase caused by charging the plaintiff at the rate of one dollar and fifty cents prior to November 21, 1920. Plaintiff may have an injunction to this extent restraining the defendant from removing its meter from plaintiff's house or shutting off his supply of gas for failure to pay such increase made prior to said date but in every other respect the motion for a temporary injunction is denied.

In my opinion the application of the public service commission to intervene should be denied. The decree in the federal action expressly restrained and enjoined the public service commission, among other things,

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"*from interfering with plaintiff* (the defendant herein) *forthwith, and while this decree is in force, charging, billing and collecting a rate or charge in excess of that fixed by said statutes or either of them for gas supplied to its consumers other than the City of New York.*" The direct purpose of this action is to prevent defendant from charging a rate in excess of that fixed by the said acts of 1906 and 1916. In my opinion this court should not sanction, either directly or indirectly, a violation of the decree of the federal court. The federal court should be requested to modify its said decree to the extent of permitting such an application as this to be made and until this be done and such request granted the application of the public service commission to intervene in this action should be denied and I, therefore, deny the same. I am also of the opinion that the city of New York should be allowed to intervene in this action under the decision and authority of the Appellate Division in this department in the case of *New York & Richmond Gas Co.* v. *Nixon*, 192 App. Div. 923. Motion of the city to intervene granted.

Motion granted.

RICHARD GODFREY, Plaintiff, *v.* BROOKLYN EDISON COMPANY, Defendant.

(Supreme Court, Kings Special Term for Motions, March, 1921.)

Workmen's Compensation Law, § 29 — when awarding compensation is decisive and binding — election.

Pleading — when motion for judgment sustaining a demurrer to separate defense granted — negligence — award.

Under section 29 of the Workmen's Compensation Law, as amended in 1917, it is not the election to claim compensation thereunder but the actual awarding of it, which is decisive and binding.

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Where in an employee's action for personal injuries alleged to have been caused by the negligence of the defendant the answer pleads as a separate defense that plaintiff made a claim for and accepted compensation from his employer, but there is no allegation that any award was ever made to plaintiff under the statute, a motion for judgment sustaining a demurrer to the separate defense will be granted.

MOTION by plaintiff for judgment sustaining a demurrer to separate defense.

Belfer & Belfer, for plaintiff.

Ingraham, Sheehan & Moran, for defendant.

KELBY, J. This action is brought to recover for personal injuries alleged to have been caused by the negligence of the defendant. The defense, which is demurred to, alleges that plaintiff, at the time of the injury, was employed by the Audley Clarke Company and made a claim, under the Workmen's Compensation Law, for compensation, and accepted compensation from the Audley Clarke Company, and, therefore, is not the real party in interest, these facts being pleaded in bar of recovery. The direct attack on the defense is that it does not allege that there ever was any award made under the Compensation Law, and it is contended, by the plaintiff, that until there has been an award, he is free to forego compensation under the law and pursue his right to recovery of ordinary damages from the direct tort-feasors. What is involved is the interpretation of section 29 of the law, as amended in 1917. This reads as follows: "If an employee entitled to compensation under this chapter be injured or killed by the negligence or wrong of another not in the same employ, such injured employee, or in case of death, his dependents, shall, before any suit or any *award* under this chapter, elect

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whether to take compensation under this chapter or to pursue his remedy against such other. Such elections shall be evidenced in such manner as the commission may by rule or regulation prescribe. If such injured employee, or in case of death, his dependents, elect to take compensation under this chapter, *the awarding of compensation shall operate as an assignment of the cause of action against such other* to the state for the benefit of the state insurance fund, if compensation be payable therefrom, and otherwise to the person, association, corporation, or insurance carrier liable for the payment of such compensation, etc."

The words which have been italicized mark the changes in the law, made by the amendment. The prior law contained the word " claim " in place of the word "award," and in place of the words beginning " the awarding of compensation," etc., contained the words " the cause of action against such other shall be assigned."

It appears from the cases which arose under the law before the amendment that it was the practice of the commission to have the claimant include in his notice of claim a formal printed assignment of the claim against the tort-feasor. This evidenced and effectuated the subrogation of the state insurance fund to the right to recover the damages. The old law contained nothing to indicate that the divesting of title to that right of action was intended to be postponed, until payment of the award, but on the contrary the express import was that it should take effect on the election to take compensation under the law. The forms prescribed by the commission containing a formal assignment, and the language of the assignment itself all evidence the same intent. *Sabatino* v. *Crimmins Construction Co.*, 102 Misc. Rep. 172. It was also

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said in that case that the amendment of 1917 had the purpose to dispense with the formal instrument of assignment, and that "it evidently postponed rather than advanced the time of the transfer of title." This is the only intent apparent in the amendment and it is the clear intent. It postpones the divesting of the title, to the cause of action against the tort feasor, until the actual award of compensation. That is now the operative and effective thing, where formerly it was the election, followed by the assignment as a procedural requirement, which had that effect. It has been pointed out that "The reason for the (old) statutory declaration as to election is founded upon the common-law rule that there should not be a double satisfaction for the same injury." *Miller* v. *New York Railways Co.*, 171 App. Div. 316, 319. The reason for the amendment rests upon an even closer analogy to the common law. It adopts the rule "Where a party has two or more remedies for the same wrong, in which the measure of damages might be different, electing one and *pursuing* it to judgment is a bar to any other remedy." *Miller Case, supra,* 319. It is not now the *election* to claim compensation under the law, but the actual *awarding* of it which is decisive and binding. Compensation paid before the award is to be regarded as "advance payments" under section 20-a of the law. The motion for judgment is granted.

Motion granted.

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WILLIAM HENDERSON, Claimant, v. THE STATE OF NEW YORK.

Claim No. 1462-A

(State of New York, Court of Claims, March, 1921.)

Court of Claims — jurisdiction — failure to file notice of intention in time — claim dismissed — claims — Code Civ. Pro. § 264.

A failure to file with the clerk of the Court of Claims and the attorney-general a written notice of intention to file a claim under a contract with the state lunacy commission for building construction relating to a hospital, as required by section 264 of the Code of Civil Procedure, is a jurisdictional defect which precludes a determination of the claim on its merits whether otherwise valid or not.

Where, therefore, the claim herein, if it accrued at all, accrued previous to August 19, 1913, the filing of a notice of intention on February 19, 1914, comes too late, and the claim must be dismissed for want of jurisdiction.

CLAIM for balance due upon a building contract.

Francis J. Kuerzi, for claimant.

Glenn A. Frank and Harry W. Ehle, deputy attorneys-general, for state of New York.

CUNNINGHAM, J. On May 12, 1911, the state, through the state commission in lunacy, entered into a written contract with the claimant by which the latter was to do the work and furnish the materials required in certain building construction at the Central Islip State Hospital for the sum of $7,000. The contract was made under the authority of chapter 507 of the Laws of 1910. The claimant completed performance of his obligations under it in September, 1911.

On July 7, 1911, and previously, the claimant bor-

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rowed sums aggregating $1,400 from one Samuel K. Kellock, and on that date made and delivered to Kellock a written assignment of all the money due and to grow due under the claimant's contract with the state, the assignment containing a clause authorizing Kellock, as the claimant's attorney, irrevocably in claimant's name, to demand and receive such payments and to receipt for them.

The claimant's contract provided that he would not transfer or assign any of the money due to him under the contract without the consent in writing of the state, and that in the absence of such consent no claim of payment should exist in favor of any person to such money.

On or before December 15, 1911, the claimant completed the repayment to Kellock of the loan above mentioned in full. On August 31, 1911, the state paid to the claimant on account of his contract the sum of $4,421.55.

On July 3, 1912, the state architect issued a certificate for final payment on the contract in the sum of $721.66, the latter sum being arrived at by deducting from the total amount of the contract the payments previously made, various deductions for credits to which the state was entitled, and $1,620, as liquidated damages at $10 a day, for 162 days' alleged delay in completing the contract. A voucher with an advance receipt attached was forwarded to the claimant for execution, the voucher describing the sum of $721.66, as the total and final balance due and payable to the claimant on the contract. The claimant refused to execute the receipt and retained the voucher until July 3, 1913, when, after being assured by certain state employees in the hospital commission that he would not prejudice his claim for the sums which had been deducted by the state, he executed the receipt and

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delivered the voucher to the commission, demanding at that time, by letter, payment of the balance which he claimed. In response, he received a letter from the treasurer of the commission under date of July 7, 1913, informing him that payment of this voucher for $721.66 had been made in February, 1913, to Samuel J. Kellock as assignee. The facts are: That on July 18, 1912, without claimant's knowledge, Kellock had filed in the office of the state comptroller the assignment made to him by the claimant, and on February 1, 1913, the treasurer of the commission had executed a duplicate of the certificate and voucher above mentioned; that the duplicate voucher was receipted by "Samuel K. Kellock, Claimant, Assignee of William Henderson," and on February 5, 1913, check for $721.66 was issued by the commission to Kellock, as assignee of the claimant, and Kellock collected it, no part of it ever reaching the claimant.

In response to the letter of July 7, 1913, from the treasurer of the commission, the claimant on July 9, 1913, wrote to the latter informing him that the loan for which the assignment to Kellock had been made, had been fully paid, and notifying him to pay no more money on the contract to Kellock, or to anyone else, without first informing claimant.

On July 18, 1913, the state architect advised the commission that the enforcement of the penalties which had been asserted by the commission, was not justified. On July 21, 1913, Kellock executed a power of attorney to some one, whose identity has not been established, to collect from the commission all money due or to become due from it to Kellock, to receipt for it and to sign, indorse and deposit the check received in payment. On July 25, 1913, the commission asked the attorney-general for an opinion as to the validity of the alleged penalty, and that official on

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July 28, 1913, advised the commission that a substantial sum could not be deducted from this contract under the guise of liquidated damages. Thereupon, on August 5, 1913, the commission, by resolution, authorized the state architect to issue a "special order" in full settlement of the contract, for $1,588, being the above-mentioned sum of $1,620, less a deduction of $32 with which we are not concerned. The secretary of the commission on that day notified the superintendent of the hospital to forward estimate in this amount and voucher "in favor of William Henderson," adding: "It will not be necessary to have Henderson's receipt attached to the voucher as he has assigned his claim to another. The same is filed with the State Comptroller." On the same day, August 5, 1913, the state architect issued a "special order" with a final certificate for $1,588 to William Henderson. On the following day a voucher was made under the special order and certificate to "Samuel J. Kellock, Assignee of William Henderson," certified by the steward of the hospital and receipted August 7, 1913, by "Samuel R. Kellock, Claimant, Assignee, by George F. Kelly, Atty." Upon this voucher, under date of August 7, 1913, the treasurer of the commission, for the state, drew a check for $1,588, to the order of Samuel J. Kellock as assignee of the claimant. George T. Kelly is an attorney at law, and a former member of assembly, of Albany. He had obtained, in some unexplained manner, the power of attorney last mentioned made by Kellock, and the name of the attorney named in the instrument having been erased by someone, Kelly inserted his own, and on August 8, 1913, presented and filed the document so altered with the treasurer of the commission, and received from him the check last mentioned, and indorsed it "Samuel K. Kellock, Assignee, George T.

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Kelly, Atty." Kelly used the check, obtained the proceeds and, so far as it appears, converted the money to his own use. In any event, no part of it reached the claimant.

Kelly was a witness under subpœna, and testified most reluctantly. He declined to say what became of the money obtained on the check, on the ground that it might tend to incriminate him. Several other questions were unanswered by Kelly on the same plea. It also appeared on the trial that the letter from claimant to the treasurer of the commission, under date of July 9, 1913, was missing from the files of the commission.

The claimant was unaware of the payment to Kelly, and of all the above-mentioned events subsequent to July 9, 1913, until December 11, 1913, when the state comptroller, by letter, informed the claimant's attorney that payment had been made on August 8, 1913, " to Samuel K. Kellock " under the assignment.

Notice of intention was filed by the claimant on February 19, 1914, and this claim was filed on March 21, 1914.

Discrepancies in middle letters of names of persons evidently were inadvertent and of no importance.

The facts disclose a fraud, amazing and rarely paralleled in effrontery. Not less astounding than the fraud itself, is the fact that the administration of the criminal law in this state permitted the Statute of Limitations to run against the offences involved without the visitation of any punishment upon the perpetrators. Kelly — and perhaps others concerned — is a member of the bar. It is unlikely that the attorney-general, cognizant as he is of the fact, will permit the matter to slip into oblivion. The Appellate Division has jurisdiction of the appropriate inquiry. Of course, this tribunal is impotent in that respect.

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The determination of this claim raises several interesting and novel considerations, a solution of the first of these being determinative of the case. Section 264 of the Code of Civil Procedure provides: "No claim other than for the appropriation of land shall be maintained against the state unless the claimant shall within six months after such claim shall have accrued, file in the office of the clerk of the court of claims and with the attorney general * * * a written notice of intention to file a claim against the state," etc.

A failure to comply strictly with this statutory provision is a defect which is jurisdictional, prevents a determination of the claim on its merits, and requires its dismissal. *Buckles* v. *State of New York,* 221 N. Y. 418; *Butterfield* v. *State of New York,* Id. 701. It is clear that, if the claim did not accrue within six months prior to February 19, 1914, when notice of intention was filed, this court has no jurisdiction of it, whatever its merits otherwise. Our essential and necessary inquiry, therefore, is simple and confined to a narrow field: Were any acts done or performed, or did any facts transpire within the period indicated, which constituted an accrual of the claim? The only occurrence affecting the claim in any respect during that period, was the discovery by claimant on December 11, 1913, through correspondence with the state comptroller, of the disbursement of the sum of $1,588 to Kellock, or to Kelly ostensibly representing the latter, and later, the acquisition by the claimant of evidence with which to establish that transaction. Obviously, unless this discovery and acquisition of facts constituted an accrual of the claim, the claim did not accrue within six months prior to the filing of the notice of intention, irrespective of whether it accrued previously or not.

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The payment to Kelly, which was the last occurrence of any sort, other than such discovery and acquisition of evidence, was made on August 8, 1913, several days more than six months previous to the filing of the notice of intention. The claimant's attorney evidently recognizes this difficulty. He argues that the claimant had six months after the discovery of the allowance and payment to the wrong party in which to file his notice of intention. He calls to our attention no New York decision to that effect, contenting himself with the argument that such is the rule between individuals in cases of fraud. The principle which evidently claimant's counsel has in mind, has its authority in an express statute, which provides a six-year period of limitation in "Any action to procure a judgment on the ground of fraud," and then continues, " The cause of action, in such a case, is not deemed to have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts constituting the fraud." Code Civ. Pro. § 382, subd. 5. Of course, this claim is not to procure a judgment other than for a sum of money; nor is it a claim on the ground of fraud. Therefore, the statute and principle involved, have no application here. This claim is in contract. If it were not, this court would have no jurisdiction of it, in the absence of a statute waiving the state's exemption from liability. *Smith* v. *State of New York,* 227 N. Y. 405. Being in contract, the statute ran against it from the moment that a claim could have been maintained by the claimant. 1 Wait Pr. 236; *Greenwood* v. *Judson,* 109 App. Div. 398; *Matter of Goss,* 98 id. 498; *Cary* v. *Koerner,* 200 N. Y. 253. Clearly, therefore, this claim, if it accrued at all, accrued previous to August 19, 1913. This conclusion requires its dismissal.

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We may advert briefly to other questions presented by the facts, although a determination of the claim does not necessitate their solution. It now is contended by the claimant that all payments made by the state upon the authority of his assignment to Kellock, were invalid because of the contract provision to which we have referred, prohibiting such transfer or assignment without the consent in writing of the state, and that in the absence of such written consent, payments made by the state to the assignee, avails the state nothing. We are not impressed by this argument. The contractual provision was inserted solely for the protection and benefit of the state. If the latter waived the requirement and recognized the transfer by making payment pursuant to its terms, that waiver affords no basis for action against the state. The claimant now is in no position to repudiate his own assignment, made by him without the consent in writing of the state, on the ground that the state waived the provision which existed solely for its benefit.

Also, it is entirely clear to us that the payment by the state of $721.66 to Kellock, on February 5, 1913, constituted a discharge and payment *pro tanto* on the contract, the payment having been made before notice to the state of the alleged invalidity of the assignment and revocation of its power of attorney. If the state had the right to recognize the assignment, payments made under it, in the absence of notice of its revocation or invalidity, protect the state and discharge the latter's obligation to the extent of such payments.

The state argues that the assignment and power of attorney to Kellock were irrevocable and consequently, that all payments made to the assignee were valid, including payment made after notice of the alleged revocation. Of course, if the state be correct

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in this contention it is a reason why the claim should fail *in toto*. However, we refrain from consideration of that question, disregarding, for the purpose of the discussion, the state's position in this respect.

The state contends very earnestly that the alleged claim never has accrued at all. Its position, in substance, is that it never has been rejected. The statute provides that this court "Has no jurisdiction of a claim submitted by law to any other tribunal or officer for audit or determination except where the claim is founded upon express contract and such claim, or some part thereof, has been rejected by such tribunal or officer." Code Civ. Pro. § 264.

This claim is one founded upon express contract and is submitted by law to another officer or tribunal for audit. The Insanity Law, section 65, provides in part: "All payments on contract or special orders, shall be made on the certificate of the State Architect, approved by the Commission as the work progresses or the purchase of materials is made and upon bills duly certified."

Consonant with these statutory provisions it is certain that this court has no jurisdiction of the claim unless it has been rejected previously by the appropriate officers. It is equally true that there has been at least one submission and rejection of all that part of the claim in excess of the sum of $721.66. This rejection was accomplished on or about July 3, 1912, when a purported final audit and determination of the claim was made by the state architect and the commission in the sum of $721.66, as full and final payment. That action, of course, involved a rejection of all claims and demands under the contract in excess of that sum. This audit and rejection, however, while sufficient as such to confer jurisdiction at that time upon this court, is of no avail to the claimant now

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because the notice of intention was not filed until more than eighteen months thereafter. As we have pointed out, delay of that extent is fatal. Nevertheless, the fact remains that on or about July 3, 1912, there was an audit and rejection.

But that was not all. It is evident that subsequently there was a resubmission of the claim in the sum of $1,588, to the state architect and the commission. It would seem to be immaterial whether this was due to the demand contained in the claimant's communication to the treasurer of the commission under date of July 3, 1913, to the initiative of the state, or to extraneous promptings. It is apparent that the proceedings taken on or about August 5, 1913, and August 7, 1913, amounted to resubmission and reaudit of the balance of the claim. It seems to us that the procedure taken did not amount to a rejection of the claim, but on the contrary, to an approval and allowance of it, payment not being made by the disbursing officer to the person entitled to receive the money. In short, it seems that the claim involved in this litigation has been audited and approved, but not paid.

In any event, the claim, whether valid otherwise, or not, must be dismissed, because the notice of intention was not filed in time. It is possible that another judicial tribunal or the legislature may afford relief to the claimant, but it is certain that this court cannot.

ACKERSON, P. J., concurs.

Claim dismissed.

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VILLAGE OF SENECA FALLS, Claimant, *v.* STATE OF NEW YORK.

Claim No. 15789.

(State of New York, Court of Claims, March, 1921.)

Canal Law, § 47 — the word "person" includes municipal corporation — jurisdiction of Court of Claims.

The word "person" in section 47 of the Canal Law includes a municipal corporation.

A claim under such provision of law made by the village of Seneca Falls for damages alleged to have been suffered by it by reason of the act, fault and negligence of the state, in the construction, maintenance and operation of the improved Cayuga and Seneca canal at Seneca Falls, whereby a large volume of water in a pool created by the state was precipitated in and upon the claimant's sewer system and sewage disposal plant, is properly a subject for adjudication by this court and the state's motion to dismiss will be denied.

MOTION to dismiss claim.

John H. Clogston, for motion.

William S. McDonald, for claimant.

WEBB, J. The claim is for damages alleged to have been suffered by the claimant by reason of the act, fault and negligence of the state of New York, in the construction, maintenance and operation of the improved Cayuga and Seneca canal at Seneca Falls, whereby a large volume of water in a pool created by the state was precipitated in and upon the claimant's sewer system and sewage disposal plant at Seneca Falls greatly damaging the same.

The argument on the part of the state was based upon the decision of this court in the case of *Town of*

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New Lebanon v. *State of New York,* 111 Misc. Rep. 310, in which case Judge Morschauser reviewed the various authorities and reached the conclusion that the claim was a public one and not within the jurisdiction of the court under section 264 of the Code of Civil Procedure. That action was based upon an agreement entered into between the town of New Lebanon and the highway department of the state by virtue of which each of the parties was to share the expense of the improvement. The comptroller refused to pay any portion of it on the ground the highway department had no authority to make the contract whereupon the town filed the claim in this court. We held that the claim was a public one, and although the contract was in our opinion a valid and binding one upon the state, it was not within our jurisdiction.

The present case, however, is not brought under the Highway Law but under the Canal Law, section 47 of which provides as follows: "There shall be allowed and paid to *every person* sustaining damages from the canals or from their use or management, or resulting or arising from the neglect or conduct of any officer of the state having charge thereof, or resulting or arising from any accident or other matter connected with the canals, the amount of such damages to be ascertained and determined by the proper action or proceeding before the court of claims." There is no similar provision in the Highway Law and except for this section of the Canal Law there could be no recovery on this claim.

The sole question presented by this motion is whether the words "every person" include a municipal corporation. If it does the state has waived its immunity for the damages sustained by the village of Seneca Falls, and has submitted its liability to this court for determination. The obvious purpose of the

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statute was to secure payment to those suffering damages because of the state system of canals or the neglect of those in charge. The state assumed all liability for such damages and created a forum wherein "every person sustaining damages" could be heard and have his claim adjudicated. The claim herein, which upon this motion we must accept as a true statement of facts, alleges the construction and ownership by the village of Seneca Falls, a domestic municipal corporation, of a sewage system and disposal plant of large value, that the state of New York, in the construction and operation of the Cayuga and Seneca canal injured and damaged its sewers and disposal plant to the extent of $20,000, for which claim is made. Were the claimant an individual his right to recover in this court would be unquestioned. To hold that the individual could recover while a number of individuals incorporated under the Village Law, all damaged from the same cause could not, would scarcely carry out the purpose of this remedial statute. The General Construction Law, section 37, reads: "The term person includes a corporation and a joint stock association."

And in the case of *Ackert* v. *City of New York*, 156 App. Div. 840, it was expressly held as follows: "Although municipal corporations are not designated by the name, they are included in the term 'person' employed in the statute which is defined by section 37 of the General Construction Law as including corporations and joint stock companies." While the point there under discussion was a construction of the Labor Law, the language employed is entirely applicable to the case presented in this record.

Quite a similar construction was adopted by Judge Rodenbeck in the case of *O'Bryan* v. *State of New York*, 68 Misc. Rep. 618. He then held that the expres-

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sion "*individual* or *corporation*" used in section 264 of the Code of Civil Procedure, and in this same section 47 of the Canal Law, included a town, as a town was a corporation. A village is as much of a corporation as a town and both are defined to be such by section 2 of the General Municipal Law. Laws of 1909, chap. 29.

My conclusion is that the word "person" in section 47 of the Canal Law includes a municipal corporation, and a claim filed by a village of the nature here presented is properly a subject for adjudication by this court, and accordingly the state's motion to dismiss is denied.

ACKERSON, P. J., concurs.

Motion denied.

Matter of the Estate of CHARLES SIDENBERG, Deceased.

(Surrogate's Court, New York County, March, 1921.)

Wills — construction of holographic codicil — probate — Statute of Wills — witnesses — verification.

A will having been admitted to probate and two holographic codicils thereto denied probate for non-compliance with the Statute of Wills, a third holographic codicil written upon both sides of a one-sheet letter head was offered for probate. On the front page of said codicil the testator commencing "Add to my will" made testamentary dispositions of property, and at the bottom of the page wrote "N. Y. July 13, 1917." On the back of the said paper and addressed "To the Surrogate of the City of N. Y. and my trustee" he expressed his desire, as stated on the other side of the paper, signed his name, and dated the paper February 13, 1919. To the left of his signature were those of two witnesses and below, a verification before a notary public on March 14, 1919. *Held*, that "N. Y.

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July 13, 1917" and certain words on the back of the paper, as well as the verification, should be stricken out, and February 13, 1919, taken as the date of execution, and as so construed the codicil will be admitted to probate.

PROCEEDING upon the probate of a will.

Walter M. Weis, for proponents.

Emmet, Marvin & Roosevelt (Joseph K. Savage, of counsel), for contestants.

M. S. & I. S. Isaacs, for executors.

Edward W. Stitt, Jr., special guardian.

COHALAN, S. This case illustrates sharply the dangers of will making by laymen. A will drawn under proper legal supervision having been admitted to probate three holographic scripts are offered for probate as codicils thereto. Proof as to two of them fails utterly to satisfy the requisites of law. Probate of the papers dated February 7, 1915, and September 20, 1915, is therefore denied.

The third paper is a one-sheet letterhead. On the front thereof appears the following in the handwriting of the testator: First, the words "Add to my will as beneficiaries, Two Hundred and Fifty Dollars each" below a column of names, the last four in smaller characters than the first eight. In the right hand margin, written along the length of the page, the following: "Each of my Grand Children One Thousand Dollars at the Age of 21. All Bequests shall be free of Tax." Finally at the bottom, a date, "N. Y., July 13, 1917." On the back, in the decedent's handwriting, appears the following: "To the Surrogate of

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the City of N. Y. and my trustee, I want the names on the other side to receive the amounts stated just the same as if it were embodied in my will. I will embody it in my will as soon as it is rewritten." Then appears the signature of the decedent, "Charles Sidenberg" and a date beneath the signature, "Feb. 13, 1919." To the left side are the signatures of two witnesses. To the right of these signatures, and below the signature of the decedent, are the words: "It will be observed I have given to those I thought needed it most." Then follows a verification before M. A. Fowler, a Notary Public, on March 14, 1919.

The contestant has stressed the difference in dates on front and back of the paper, and argued that each side is a separate instrument, and that the doctrine of incorporation by reference is involved. I am not in accord with such view. The script probably was not written at the same time, but that is not fatal to it being considered as one instrument. The testator, I am confident, looked upon it as a single document. It is the common sense view and the view I adopt. True, the witnesses at the time of execution saw only the back, and are unable to state whether or not the writing on the front was there, but there is nothing unnatural in this. There is also some haziness and an extraordinary lack of memory on the part of the subscribing witnesses as to the mechanics of the making, but despite this it is my opinion that the only question for solution is whether or not the document is signed at the end.

The enlightening opinion of the Court of Appeals in *Matter of Field*, 204 N. Y. 448, is broad enough in my judgment to sweep away any doubt that this script is signed at the literary, natural, logical, speaking and constructive end thereof. Starting to read on the front—and what is more natural than for a layman

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to start a codicil with the words "Add to my will"— and continuing on the back, we have a "natural and consecutive method of reading." There need be no turning back; the sense is connected and continuous.

There being no testimony but that the document was, when executed, in the condition it now is, it is presumed that if any alterations or additions thereto were made they antedated execution. *Matter of Conway,* 124 N. Y. 455, 466. And this view is strengthened by the fact that we are considering a holograph. *Matter of Wood,* 144 App. Div. 259.

The words on the front page, "N. Y., July 13, 1917," and the words on the back page, "It will be observed I have given to those I thought needed it most," as well as the verification before the notary, are to be stricken out as immaterial. *Matter of Gibson,* 128 App. Div. 769. The date of execution is to be taken as February 13, 1919. As thus construed I admit to probate the paper propounded. I am thus carrying out the undoubted wishes of the testator, a point of paramount importance, and one to which form, however devoutly to be wished for, must, whenever it is reasonably proper, yield.

Decreed accordingly.

Matter of the Estate of FRANCIS H. ROSS, Deceased.

(Surrogate's Court, New York County, March, 1921.)

Bill of particulars — when will be ordered to be furnished to proponent of a will — Surrogate's Court — Code Civ. Pro. § 531.

Objection to the factum of the will and allegations of lack of testamentary capacity being practically a general denial of what proponent must prove to establish the will, such denial is not a "claim" under section 531 of the Code of Civil Pro-

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cedure, and does not warrant an order that contestants furnish a bill of particulars.

But where allegations of fraud and undue influence are sufficient to require contestants to furnish the name or names of those charged with exercising fraud or undue influence upon the testator or to state lack of knowledge in that respect, a bill of particulars will be ordered to be furnished to proponent, particularly where he swears that he has endeavored to obtain such information, and the will does not indicate with certainty who would be likely to exercise any fraud or undue influence.

APPLICATION in a probate proceeding requiring contestants to deliver a bill of particulars.

Hugo Wintner, for proponents.

Thomas J. O'Neill, for contestant.

COHALAN, S. This is an application to require the contestants in a probate proceeding to deliver a bill of particulars. The Code (§ 531) provides that the court may direct the delivery of a bill of particulars of the "claim" of either party. The word "claim" as used in this section has been defined in the case of a defendant to be "whatever is set up by him as a reason why the action may not be maintained against him. The claim of the defendant is that ground of fact which he alleges in his answer as the reason why judgment should not go against him. His claim, in the case, is the position he takes in his pleading, based upon the facts he sets up, and the law applied thereto, why he should go without day." *Dwight* v. *Germania Life Insurance Co.*, 84 N. Y. 493, 504.

The first two objections to the factum of the will and the third objection alleging lack of testamentary capacity are practically a general denial of what the proponent must prove to establish the will. They merely assert a negative and do not set up any facts.

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Such a denial is not a "claim" under section 531 of the Code of Civil Procedure, and does not warrant the ordering of a bill of particulars. The proponent knows what he has to prove to show due execution and he knows or ought to know just what proof he will be able to offer in that regard. If there is any doubt about the sufficiency of such proof, the proponent knows it or ought to know it, and to require a bill of such objections would serve no useful purpose.

On the issue of fraud and undue influence the contestants have the affirmative and the burden of proof. The pleading might of course be amplified by an application to make it more definite and certain, but I think the allegations of the fourth and fifth objections are sufficient to require the contestants to furnish the name or names of the person or persons charged with fraud or undue influence, or to state lack of knowledge in that respect. This is not compelling the contestants to furnish their evidence as in the case of *Smidt* v. *Bailey*, 132 App. Div. 176, where the complaint stated the name of the person charged with practicing the fraud and undue influence, and in which the court denied a bill as to all other items. Restricting the bill as above accords with the few decisions on the subject. *Matter of Halloran*, N. Y. L. J., April 29, 1916; *Matter of Cramer*, Id., Nov. 14, 1916; *Matter of Brown*, Id., Dec. 20, 1919; *Matter of Emmons*, Id., Jan. 8, 1920. In this case the proponent swears that he has endeavored to obtain this information and the will itself does not indicate with any degree of certainty who would be likely to exercise any fraud or undue influence. Application granted in part as indicated.

Application granted in part.

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J. FRIEDMAN & CO., INC., Plaintiff, v. AMALGAMATED CLOTHING WORKERS OF AMERICA, an Unincorporated Association; SIDNEY HILLMAN, Individually and as General President of the Amalgamated Clothing Workers of America et al., Defendants.

(Supreme Court, New York Special Term, March, 1921.)

Associations — unincorporated — actions against — pleading — injunctions — when motion for judgment on the pleadings granted — Code Civ. Pro. § 1919.

In an action brought under section 1919 of the Code of Civil Procedure against the president of an unincorporated association on any cause of action upon which plaintiff may maintain such an action against all the associates, the court must find upon allegations and proof that all the members of the association are liable.

Where in such an action brought against one individually and as president of the "Amalgamated Clothing Workers of America" and against others individually and as officers, agents or employees of the organization, the complaint alleges "that all of the defendants herein have combined and conspired and agreed to carry out all of the aforementioned purposes * * * by their acts and conduct," and that they "are wrongfully and unlawfully * * * instigating plaintiff's employees to cease work and * * * have caused a general strike against manufacturers of clothing in the city of New York and * * * are instigating persons to picket plaintiff's factories and coercing * * * and intimidating plaintiff's employees," and a particular allegation of the pleading gives irrefutable evidence that the pleader intended the term "defendants" to apply to the persons actually named as such in the caption, in contradistinction to the term "all members of the association" and that when the pleader intended to designate the latter class he so expressly denominated them, but there is no allegation that all the members of the defendant association participated in alleged overt acts or purposes of the association, authorized or ratified the same or are chargeable with knowledge thereof, the complaint, considering the allegations thereof as though they were all to be considered as bearing solely upon the right to an

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injunction, fails to state a cause of action and defendant's motion for judgment on the pleadings will be granted, with leave to plaintiff to plead over, if so advised.

MOTION for judgment on the pleadings.

Gordon, Tally & Gordon (Max D. Steuer and Harry A. Gordon, of counsel), for plaintiff.

Lowenthal & Szold (Samuel Seabury, of counsel), for Sidney Hillman, as president of Amalgamated Clothing Workers of America, and others.

S. John Block, for Abraham I. Shiplacoff and others.

BIJUR, J. This is a motion for judgment on the pleadings made on behalf of defendant "Sidney Hillman, individually, and as General President of the Amalgamated Clothing Workers of America," and also on behalf of certain other officials of that organization. The motion is directed particularly against the sufficiency of the complaint to charge the Amalgamated Clothing Workers of America as an unincorporated association in that it fails to allege a cause of action maintainable against all of its members. This point is based upon the fact that the action is brought against the association pursuant to the privilege accorded to the plaintiff by section 1919 of the Code of Civil Procedure which permits it to be maintained against the president or treasurer "upon any cause of action, for or upon which the plaintiff may maintain such an action against all the associates." It is well settled that where the action is so brought "the plaintiff must allege and prove, and the court must find, that all the members of the association were liable." *McCabe* v. *Goodfellow,* 133 N. Y. 89, 92; *Schouten* v. *Alpine,* 215 id. 225, 232; *People ex rel. Solomon* v.

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Brotherhood of Painters, 218 id. 115, 123; *Brower* v. *Crimmins,* 67 Misc. Rep. 68, 71; *Mazurajtis* v. *Maknawyce,* 93 id. 337, 340. Plaintiff's counsel undertake to demonstrate that the complaint does charge all the members with liability for the acts which are laid as the foundation of the cause of action. In order to ascertain whether this claim is well founded an examination of the complaint is necessary. It is brought, as I have said, against " Sidney Hillman, individually and as General President of the Amalgamated Clothing Workers of America;" also against a number of other persons individually and as officials in various capacities of said organization; against some forty or fifty other persons " individually and as members, agents and employees of " said organization, and against one Leiserson, apparently merely as an individual.

After alleging the corporate capacity of the plaintiff and that it is engaged in the ownership and operation of factories and plants for the production of clothing, it proceeds, in paragraphs 3 and 4, to set out that the Amalgamated Clothing Workers of America is " an unincorporated membership association having a membership of 175,000," distributed throughout many cities in the United States; " that in and by the constitution it is provided that the aforesaid general executive board shall have the right, power and authority to call and authorize strikes and to direct and to declare boycotts." This is preceded and followed by details of its organization covering its governing body or bodies and the local unions authorized or created by it; also allegations of the precise official capacity of said Hillman and of the other officers.

In paragraph 10 it is alleged " that all of the remaining defendants, except Leiserson, were in the employ

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of the plaintiff up to about December 1, 1920, but have ceased to be in plaintiff's employ, and that the defendants at all the times hereinafter mentioned were and still are all members, agents or employees of the defendant Amalgamated Clothing Workers of America."

Paragraph 11 alleges that the association is controlled by a constitution duly adopted. Paragraph 12 contains an extract from the preamble to the constitution alleged to be "the purpose of the organization," reading as follows: "The industrial and interindustrial organization, built upon the solid rock of clear knowledge and class consciousness, will put the organized working class in actual control of the system of production and the working class will then be ready to take possession of it."

In paragraph 13 it is alleged that the association was organized "only for the purpose of destroying the existing industrial structure in the clothing industry * * * and the present industrial system of ownership by private persons * * * of the business and factories and all of the means for production of clothing * * * including the ownership by the plaintiff of its clothing business * * * and solely for the purpose of wresting, taking and seizing from the employers * * * all private property, machinery, goods, wares and merchandise * * * and solely and only for the purposes of encouraging and inciting other workers in other industries to agree and conspire to destroy the present industrial structure * * * and the seizure of said means of production and properties by said workers * * * and to destroy existing social, industrial and political structures and to substitute in lieu and in place thereof the rule of the proletariat * * * that all of the de-

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fendants herein have combined, conspired and agreed to carry out all the aforementioned purposes."

In paragraphs 14, 15 and 16 it is set forth that the plaintiff entered into contracts of employment with various persons on the express understanding that they had ceased to be affiliated with the defendant association and would not join it in the future, and in paragraph 17 " that in violation of the contract rights of the plaintiff * * * and inspired by opposition to all forms of law and order " and in pursuance of the various unlawful purposes hereinbefore recited " the defendants are wrongfully and unlawfully * * * instigating plaintiff's employees to cease work and join with the defendant association for the aforesaid purposes, and the defendants have caused, sanctioned and directed and are conducting a general strike against the manufacturers of clothing in the City of New York * * * and the defendants have been and still are wrongfully and unlawfully instigating persons to become engaged in the practice of picketing plaintiff's factories," and that said pickets are in various disorderly ways intimidating plaintiff's employees from continuing to work for them and hampering the free dispatch of plaintiff's business.

Paragraph 18 recites " that in pursuance of the aforesaid unlawful combination, agreement and conspiracy the defendant Amalgamated Clothing Workers of America has voted the sum of $1,000,000 to be collected from and contributed by the members of said defendant for the purposes of carrying on the aforesaid strike " and the other purposes recited, " and that all of the defendants herein, except Leiserson, have approved and agreed to the collection of said sum of $1,000,000 and have proceeded to collect said sum of $1,000,000 from the members of the defendant union and have collected from said members a substantial

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part of said $1,000,000." The 19th and 20th paragraphs contain allegations of the plaintiff's damage and the absence of an adequate remedy at law.

On this complaint it is demanded, *first*, that the defendant Amalgamated Clothing Workers of America be decreed to be an unlawful combination and conspiracy and be dissolved; and, *second*, "that the defendants and their and each of their agents, etc., be enjoined from doing any acts injurious to the plaintiff," and in particular from enticing or interfering with plaintiff's employees, or from creating or continuing a strike or from picketing or congregating about plaintiff's premises and intimidating plaintiff's employees; and, third, that a judgment be entered awarding plaintiff the sum of $500,000 damages suffered.

It will be observed that the complaint really sets forth two causes of action, one for a dissolution of the defendant association as unlawful and the other for an injunction against acts for which it is sought to be held responsible. Since it is clear that no decree of dissolution can be entered in this suit brought at the instance merely of a private individual, I think that I am correctly interpreting the pleader's intention if I read the allegations respecting the alleged unlawful purpose of the association as intended to support or justify the prayer for injunction. Indeed, it was, as I understand it, conceded upon the argument of this motion and of the accompanying motion for a temporary injunction that the instant suit was aimed at something other than the ordinary elements present in controversies between employer and employee; it is designed to challenge the right of the defendant association to continue to function. The issue thus tendered has been accepted by the defendant without objection concerning the possible improper

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joinder of causes of action or the futility of the prayer for a decree of dissolution. I shall therefore deal with the allegations of the complaint as though they were all to be considered as bearing solely upon the right to the injunction. Although it is not contended on behalf of plaintiff that the bare existence of an unlawful purpose unaccompanied by overt acts constitutes ground for the issuance of an injunction (see *Reynolds* v. *Everett*, 144 N. Y. 189, 194–5; *Sinsheimer* v. *United Garment Workers*, 77 Hun, 215, 217), nevertheless it may not be unprofitable to inquire first whether there is a sufficient allegation that the unlawful purposes claimed to exist are entertained by or that knowledge thereof is chargeable to all the members of the association. Plaintiff's counsel in their brief claim that there are adequate allegations in that respect because "it is alleged that the preamble to its constitution provides that one of the purposes is 'to put the organized working class in actual control of the system of production and the working class will then be ready to take possession of it,'" and that "all the members of the association who are parties to this action because they are being sued through their president, Sidney Hillman, are charged with knowledge of the provisions of their own constitution and are presumed to be bound by its terms."

I understand plaintiff's claim in this regard to be that the preamble quoted expresses an unlawful purpose, with knowledge of which all the members of the association are chargeable. Taking at its face value this extract from the preamble as recited in the complaint, although its context is not set out, and judged by every fair standard of interpretation, particularly in an instrument of this character, I think the phrases quoted are quite innocuous. They express some ideal which, it is hoped, may at some time be achieved. But

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even if we do violence to its plain intendment, and endeavor to read into the literal words a suggestion that it is hoped that the working class shall be put into actual control and possession of the instrumentalities of production, rather than of merely the "system" of production, as actually expressed, there is still absent any statement or even implication that this is to be accomplished by forcible or other unlawful means. Indeed, plaintiff's counsel do not in terms charge or claim that this expression in the preamble is, standing by itself, evidence of the unlawful purpose of the organization, but proceed, without further comment, after the sentence from the brief which I have just quoted: "Thus it is distinctly alleged in paragraph 13 of the complaint, extracts from which have been quoted, that the Amalgamated Clothing Workers of America was organized and exists, operates and exercises its functions and activities for the purpose of destroying the private ownership and substituting the rule of the proletariat, and transferring all private property from the present owners to the members of the Amalgamated Clothing Workers of America. An allegation that the Amalgamated Clothing Workers of America was organized and exists for the purposes aforesaid, and is carrying out these purposes, is tantamount to an allegation that all of its members together, by virtue of their membership in the Amalgamated Clothing Workers of America, are parties to these purposes and these activities, and thus a charge that the Amalgamated Clothing Workers of America was organized and is operating and conducting its activities is tantamount to a charge that all of its members are doing so."

I have reproduced this paragraph from the brief to avoid the possible injustice of misinterpreting it.

At the outset it is to be noted that the complaint

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nowhere purports to set forth or quote from or even paraphrase the exact language of the constitution of the association. The allegation in this respect advisedly made "upon information and belief" is that the association "was organized, created, formed and established and still continues to exist, operate and exercise its functions and activities solely and only" for the "unlawful purposes" thereinafter set forth and hereinabove more fully recited. It seems to me to be quite plain that to allege merely that an association was organized and exists for certain purposes is far from asserting as matter of fact that all its individual members are pursuing or in favor of pursuing that purpose, or even that they are chargeable, expressly or impliedly, with knowledge thereof and have therefore acquiesced therein. The absence of any allegation that the constitution of the association recites or suggests the alleged unlawful purposes is significant. We are not dealing here with conjecture nor with possibilities of proof however difficult or intricate, but with allegations of fact to form the basis of a cause of action. Finally, however liberal may be the rules of construction to be applied to a pleading, I know of none which permits the interpretation of a general allegation of the purposes of an association as the equivalent of a categorical statement (which could have been couched in a few words) that all of its members are in favor of or are engaged in pursuing such purpose, or have directly or indirectly authorized or ratified acts in furtherance thereof.

I come, then, to the averments of the complaint in regard to overt acts, as for example, in the 13th paragraph, "that all of the defendants herein have combined and conspired and agreed to carry out all of the aforementioned purposes * * * by their acts and conduct," and in the 17th paragraph that "the

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defendants are wrongfully and unlawfully * * * instigating plaintiff's employees to cease work and * * * have caused a general strike against manufacturers of clothing in the City of New York and * * * are instigating persons to picket plaintiff's factories and coercing * * * and intimidating * * * plaintiff's employees." It is urged in plaintiff's brief that the words "all of the defendants herein" are equivalent to the phrase "all of the members of the Amalgamated Clothing Workers of America" and that "when the 'defendants' are referred to the reference is to 'all of the persons who are being sued through their representatives, such as president, treasurer, secretary,'" etc. This, however, is to give a forced and unnatural construction to the phrase "all of the defendants herein," which ordinarily means the defendants named in the caption or otherwise. Assuming for the moment that I would not be unwilling to strain the common meaning of words in order to give them the significance contended for, yet the draftsman of the complaint has incorporated therein several other phrases which compel the exclusion of such construction. Thus, for example, the allegation in paragraph 10 "that the defendants were and still are all members, agents or employees of the defendant, Amalgamated Clothing Workers of America," would be wholly unnecessary and meaningless if all the members of that association were already included as defendants by the mere representative presence of their president. But a conclusive answer to the claim for this construction is to be found in the 18th paragraph that "the defendant, Amalgamated Clothing Workers of America, has voted the sum of $1,000,000, to be collected from and contributed by the members of said defendant * * * and that all of the defendants herein have approved and agreed

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to the collection of said sum and have proceeded to collect said sum from the members of the defendant union and have collected from said members a substantial portion of said sum." Here we have irrefutable evidence that the pleader intended the term "defendants" to apply to the persons actually named as defendants in the caption, in contradistinction to the term "all the members of the association," and that when he intended to designate the latter class he so expressly denominated them.

Thus, in respect of the alleged acts, just as in regard to the alleged purposes, we find that the draftsman of the complaint has significantly omitted the simple averment that all the members of the defendant association have participated therein or have authorized or ratified the same or are chargeable with knowledge thereof.

In my opinion, therefore, the complaint fails to allege a cause of action against all the members of the defendant association, and is defective in that respect.

I have confined myself in the foregoing discussion exclusively to the question of pleading, but I may say that the papers submitted on the coincident motion for a temporary injunction convince me that the point discussed is not merely a formal one, but concerns the ultimate merits of the controversy.

In view of the manner in which the complaint is framed, and in which the accompanying motion for a temporary injunction was argued it is not feasible — even if it were desired — to consider the papers as seeking relief solely against some of the defendants as individuals. Much, if not most, of the allegations of the complaint and of the moving affidavits would have to be eliminated, since they do not bear upon the individual liability of the defendants, and new con-

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siderations suggest themselves which are not covered by the papers.

For these reasons the motion for judgment on the pleadings made by the defendants is granted, with ten dollars costs, with leave, however, to plaintiff to plead over within twenty days, if it be so advised.

Ordered accordingly.

HARRISON BOEHM, Plaintiff, *v.* EMMA H. PLATT, Defendant.

(Supreme Court, Kings Special Term, March, 1921.)

Contracts — sale of real property — specific performance — title — notice — rescission — lease — insurance (fire).

A contract for the sale of real property under which title was to be closed on or before June 1, 1920, upon a five days' notice from the purchaser, provided that possession was to be delivered to him at the time of the settlement subject to an existing lease which contained a clause that if the building should be rendered untenantable by fire the rent should cease until the building could be put in complete repair. On April 10, 1920, while the seller was still in possession of the premises the building thereon was substantially damaged by fire. On May 28, 1920, about two weeks after the seller's attorney had written to the attorney of the purchaser that it was not the seller's intention to commence rebuilding until the purchaser had finally indicated his decision to accept the property or rescind the contract, the seller by letter refusing to extend the time of settlement, stated in substance that inasmuch as the purchaser's time limit for giving the notice of his readiness to settle had expired, defendant considered the contract broken by the purchaser. In an action for specific performance with abatement from the purchase price on account of the damage caused by the fire, *held*, that the five days' notice was required only in case the plaintiff availed himself of the implied privilege of closing the title before June first, the law day of the con-

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tract, and that defendant's repudiation of the contract by the letter of May twenty-eighth was without legal justification.

The premises having been restored by defendant at an expense concededly less than the insurance collected, plaintiff, who is willing to take the premises as they now are, was entitled as of right to a conveyance thereof, upon payment in full of the purchase price.

No provision having been made covering the contingency of the loss of rent caused by the fire, the parties in that respect should be left as they are.

ACTION for specific performance.

A. Foulds, Jr., for plaintiff.

A. Leo Everett, for defendant.

KAPPER, J. Action for specific performance of a contract for the sale of real property between plaintiff, purchaser, and the defendant, seller. The contract is dated February 17, 1920. It provides for the closing of title "on or before June 1, 1920." A subsequent clause provides that the "purchaser shall give the seller at least 5 days' notice of the time when he will be ready to make settlement." Possession was to be delivered "at the time of settlement subject to the existing lease." The lease in question contained a clause that if the building should be rendered untenantable by fire, the rent should cease until the building should be put in complete repair and in case of total destruction the rent should be paid to that time and thereupon the lease should terminate. The seller retained possession of the premises. On or about April tenth, the building on the premises was substantially damaged by fire. On May thirteenth, the defendant's attorney wrote the plaintiff's attorney that it was not the intention of the defendant to commence rebuilding until the purchaser "has finally indi-

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cated his decison to accept the property or rescind the contract of sale." This was followed by a letter dated May twenty-eighth, in which the defendant refused to extend the time for settlement and stated that in as much as the time within which the plaintiff was to give notice of his readiness to settle "has gone by," the defendant considered the agreement broken "by the purchaser's failure to indicate his willingness to make settlement within the time specified." The plaintiff thereupon and on June seventh brought this action. The defendant's repudiation of the contract as evidenced by the letter of May twenty-eighth, written four days before June first, indicates that the defendant construed the contract as requiring the plaintiff to give five days' notice, in any event, of his intention and willingness to close. In this view I do not concur. The contract provided for settlement "*on or before June 1, 1920.*" No notice was required of an intention to close on that day. June first was the law day of the contract. Five days' notice was required only in case the purchaser availed himself of the implied privilege of closing before June first. Any other construction would force the conclusion that the contract was unilateral, for the purchaser might never give the notice. Therefore, the defendant's repudiation of the contract on May twenty-eighth was without legal justification and the plaintiff promptly avowed his refusal to acquiesce by bringing this action. The parties differ radically as to whether the burden of a loss by fire, occurring between the date of execution and the day of performance of an executory contract for the purchase of real property, should be borne by the seller or by the purchaser. The question has led to much diversity of judicial opinion. It has been said to be the general rule that the loss falls upon the purchaser. Many cases are cited in the note found in

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27 Lawyers Reports Annotated (N. S. p. 233), also in Ruling Case Law (Vol. 27, § 293 et seq.), under the title "Vendor and Purchaser." Such is the contention of the defendant, who relies upon the case of *Sewell* v. *Underhill,* 197 N. Y. 168. An examination of that case discloses that the vendee was *in possession,* had paid the required cash consideration, had begun to pay the interest on his bond and mortgage, and had made repairs and improvements; and both the bond and mortgage and the deed had been executed. So, in the great majority of the cases where the doctrine has been asserted, it will be found that the vendee was *in possession* or had the right of possession under the contract. In *Smith* v. *Phoenix Insurance Co.,* 91 Cal. 323; 13 L. R. A. 475, the court say: "For the purpose of this decision, it is sufficient to say that no case had been cited, and we have discovered none in which the vendee has been held bound to pay the purchase price where a valuable part of the property has been destroyed before the day fixed for payment and conveyance, *unless he has taken possession under the contract of sale,* or has the right to such possession under the contract before the occurrence of the loss." My own research bears out this view, and counsel cite me no case showing otherwise. See, also, *Wicks* v. *Bowman,* 5 Daly, 225; *Smith* v. *McCluskey,* 45 Barb. 610. An executory contract usually creates dependent covenants. The vendor must convey and the vendee must pay the consideration. Each act is a condition precedent to the other. Neither party can require the other to perform without himself offering to perform. And unless the contract so provides, the vendee has no right of possession until he has paid the consideration and so performed the condition precedent. The execution of the contract of sale of itself does not give the vendee even a license to enter,

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27 R. C. L. § 285; *Teller* v. *Schulz*, 123 App. Div. 883; *Fagan* v. *Scott*, 14 Hun, 162. But a vendee *in possession* has physical control of the property and is vested with all the outward indicia of ownership; the full beneficial enjoyment of the property is his. With reason, therefore, may the doctrine be asserted that a vendee should bear the loss of that which he possesses, controls and enjoys. But the doctrine does not appeal to me with equal force *where the vendor retains possession and control.* However, it does not seem to me to be necessary to decide the question in the present case. In her brief the defendant states " upon the happening of the fire, the plaintiff had the right to demand a conveyance of the property, paying the full purchase price, and perhaps claiming the benefit of any insurance which there was upon the property." I assent to the proposition. This is precisely what plaintiff did. The defendant had repudiated the contract. Plaintiff immediately sued for its enforcement. He could not foresee that defendant would restore the property and he framed his complaint accordingly, asking for specific performance with abatement from the purchase price on account of the damage caused by the fire. With full knowledge of the pendency of the action and before the trial thereof, defendant restored the property at an expense concededly less than the amount of the insurance theretofore collected by her. " Insurance on buildings burned after the making of a contract of sale belongs to the vendor, where the loss falls on him because the contract had not been executed by transfer of possession, and the validity of the title was still under investigation. So where insured property is destroyed after the making of the contract of sale, but before the payment of the purchase money and the execution of the conveyance, the proceeds of the insurance belong to the vendor as between him

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and the company; but he acts as trustee for the vendee, who, upon payment of the purchase price, is entitled to the insurance money in equity." 5 Joyce Ins. § 3488c. Plaintiff is willing to take the premises as they now are. Defendant may not complain, for she has suffered no injury. In fact, in so far as the insurance was not exhausted in restoring the property, the defendant has benefited financially. Neither will she be heard to complain of the loss of a better bargain since made. If this be so, defendant made the better bargain with knowledge of the pendency of a suit based upon her wrongful repudiation of a valid pre-existing contract, and her action in so doing precludes her in this respect from equitable consideration. Both parties contracted with knowledge of the provision in the outstanding lease that rent should cease upon the destruction of the building by fire; they provided that taxes, water rents, interest, house rents, and premiums on fire insurance were to be adjusted as of April second. This clearly has reference to rents actually to be received. No provision was made covering the contingency of the loss of rents caused by fire. Under the circumstances presented I think the parties in this respect should be left as they are. I think plaintiff should have judgment, but without costs.

Judgment for plaintiff, without costs.

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SCHWARTZ & JAFFEE, INC., Plaintiff, *v.* SIDNEY HILLMAN, Individually and as General President of the Amalgamated Clothing Workers of America, an Unincorporated Association, and Others, Defendants.

(Supreme Court, Kings Special Term, March, 1921.)

Injunctions — pendente lite — strikes — when motion for injunction granted — labor unions — associations — contracts.

Where in an action brought by a manufacturer of clothing to perpetually and permanently enjoin the principal, general and local officers and certain members of the "Amalgamated Clothing Workers of America," a national organization having local unions under its jurisdiction, from doing acts injurious to plaintiff's business and for an adjudication that said association is a conspiracy in restraint of trade, it appears from the papers on a motion for an injunction *pendente lite* that, since the defendant union had called a strike, plaintiff had determined and done everything in its power to return to an "open shop" policy, and there is ample proof of plaintiff's claim that defendants are guilty of calling the strike, picketing the plaintiff's premises, interfering with employees and workers of plaintiff and with their contracts of employment, and in general of unlawfully instigating, advising and directing acts of various kinds against plaintiff and its business, the motion for the injunction will be granted.

APPLICATION for an injunction.

Meier Steinbrink, for plaintiff.

Lowenthal & Szold (Robert Szold, of counsel), for defendants, Hillman and others.

VAN SICLEN, J. The plaintiff corporation, a manufacturer of clothing, makes application to this court for an order enjoining the defendants during the pendency of this action from doing acts injurious

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to the plaintiff's business which, it is alleged, consist of unlawful picketing, threats, molestation, intimidation, interference with contracts of employment, and instigating, waging and continuing a strike among plaintiff's employees. The defendants oppose the motion in every particular. The relief sought by the plaintiff is to perpetually and permanently enjoin the defendants from doing the acts sought to be restrained, and for an adjudication that the defendant Amalgamated Clothing Workers of America is a conspiracy in restraint of trade and against the rights of non-union workmen, and for personal judgment.

It appears from the moving papers that in December, 1920, the defendant union called a strike against the plaintiff and that since that time the plaintiff has not recognized the defendant union, but on the other hand has determined and done everything in its power to return to what the plaintiff claims to be the "open shop" policy and entered into individual contracts with all of its employees whereby said employee agreed to become, or remain during the period of employment, non-union. Thereafter, it appears the defendants' pickets and others, at the direction of the defendant union, resorted to extreme violence upon those in the employ of plaintiff and that it is to secure relief from such condition that this application is made.

The plaintiff's contention is that those named as defendants herein are the principal, general and local officers and certain members of the Amalgamated Clothing Workers of America, a national organization having local unions under its jurisdiction and that the acts complained of have been done, directed, instigated, or authorized and approved by the defendant, and that all of the individuals committing said acts of violence are either members of the defendant

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union, employed by it, or swayed and directed by the leaders and those in charge of the activities of the defendant union. It is claimed that the defendant union is not a branch of the American Federation of Labor, but a secession movement from the United Garment Workers of America, which organization from 1914 to 1919 was recognized generally by the clothing manufacturers and that said manufacturers had contracts and agreements with said union which were, to all intents and purposes, exclusively non-union; that from August, 1919, to August, 1920, the Clothing Manufacturers Association of New York, of which the plaintiff is a member, had a so-called collective agreement with the defendant union herein and that after said August 26, 1920, said agreement was not renewed, with the resultant almost daily strikes and troubles of various kinds which continued until December, 1920, when all relations between the two were severed, and immediately thereafter the defendant union called on a strike all of plaintiff's employees. Since that time, plaintiff claims that its factory in the borough of Brooklyn and place of business in the borough of Manhattan have been picketed, most of the pickets being plaintiff's former employees; that these pickets intimidated, threatened and insulted plaintiff's employees as they came to and left their place of employment and in addition thereto, the employees and workers of the plaintiff were assaulted and such serious injuries inflicted on some that it was necessary to resort to the courts and to the grand jury. Plaintiff contends that the activities of the defendant union have continued and it is attempting by force and violence and threats and persuasion to entice the plaintiff's employees away and to break their contracts with the plaintiff and to join the defendant union; that in order to succeed, the

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defendant has voted a large sum of money for that purpose, has held public meetings at which defendant's officers or leaders have counselled and advised the members to acts of violence and to do the very acts complained of by the plaintiff and which it claims threatens to wholly destroy its business. By affidavit and otherwise, the plaintiff sets forth fully specific acts of violence practiced on plaintiff and its employees by the defendant union members, pickets or those advised, swayed or controlled by them, against which plaintiff claims it can obtain no relief other than by injunction.

The defendant union seeks to meet the charges and allegations of the plaintiff and its complaint by disclaiming that the defendants are responsible for any of the acts complained of, even though some of the members of the defendant union or its local may have participated or been implicated in the unlawful acts charged. However, it appears from all the papers, sufficient for the purpose of this motion, that the real control of the entire situation is with the defendant union, its officers and directors and those who advise, direct and control the course and conduct of the union and its members. Manifestly no other result could reasonably be expected to follow, when the speeches at the meetings, the advice and counsel of the officers and leaders of the defendant union and the very purpose and character of the existence of the defendant union and its activities in the strike called against the plaintiff are considered. From the foregoing, the defendant union will not be heard to deny that it called said strike and to now assert that instead of the defendant being in a conspiracy with the former employees of the plaintiff to ruin the plaintiff's business, the plaintiff and other manufacturers allied with it are seeking to destroy the defendant union.

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Further, the defendant union claims that the former employees of the plaintiff want to go back to work, but fails to state the conditions to be insisted upon. Plaintiff has offered to take the former employees back to work and stated its conditions, which the defendant union, of course, will not accept.

The defendant admits that there is picketing of plaintiff's places of business, but declares that it is by the individual employees after the "lockout" in December, 1920, without any instigation or direction of the defendant union; that the defendant union has nothing to do with the pickets and that, therefore, the injunction sought against picketing must be denied. In the brief presented on behalf of the defendants, the defendants, in spite of the fact that they deny any responsibility for the picketing alleged, in the strongest terms assert that picketing is lawful, that it has a highly useful purpose, and uphold the manner and method of picketing complained of in this very action. The defendant also disputes any merit to the plaintiff's claim that relief should be afforded the plaintiff as to its contracts of employment. The defendant, however, does not in any wise question the contracts which it imposed upon the employers from 1914 to 1919, but claims that defendant should not be restrained because it is not shown that the defendant's acts are wilful or malicious and that the plaintiff and other manufacturers cannot, by forcing upon the workers such a contract, practically paralyze the activities of the defendant union, its members, and workers generally. In any event, the defendants say that the pickets did nothing to induce a breach of said contracts. As to the assaults and other acts of violence, the defendants' answer is that the defendant Hillman and the other individual defendants above named are not shown to be in any way connected with

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the same and that the guilty individuals should be prosecuted. Finally, the defendant's contention is that the relief sought by the plaintiff should be denied because it comes into court with unclean hands. If the papers presented show that the plaintiff is unclean and that it has entered into a conspiracy to destroy the defendant union and to oppress its members and prevent workers generally from obtaining a living, the plaintiff should be turned out of court even though it appears that both the plaintiff and the defendants are of equal guilt. All the papers submitted must be carefully considered upon the point and the prior character of the acts and conduct of both parties should be reviewed. It seems from all the papers submitted upon this motion that both the plaintiff and the defendants herein named have been fully advised for a long time prior to the commencement of this action as to the course of conduct of each, and every turn of the affairs and activities of all concerned, so that no one should now be heard to deny the responsibility and liability therefor.

The issue between the parties is nothing more than the old conflict between capital and labor. The swing of the pendulum is influenced almost entirely by the law of supply and demand, and neither capital nor labor at any time is satisfied to be governed by the length or sweep to and fro. Prior to December, 1920, when the trouble between the parties hereto became acute, and from 1914 to the last mentioned date, the swing was entirely to the side of labor, enabling it to force upon capital, demands and contracts of employment exclusive as to non-union or unorganized workers, and, therefore, oppressive. Now, and perhaps for a few years to come, the pendulum swing will be to the side of capital, which in turn will force upon labor, contracts equally oppressive and exclu-

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sive as to union or organized workers. It will be seen that at no time is there what may be termed, the true "open shop." The authorities seem to uphold both forms of contract and commend them except, perhaps, when it can be determined or proven that the same are oppressive, or a result of conspiracy, or in restraint of trade. A peculiar slant to the whole situation is that the worker of to-day may become the master of to-morrow; from the radical to the conservative by mere change of circumstances and position. Nevertheless, there will be no change in their relationship. When capital has the upper hand it will continue to grind down labor and when labor is in the ascendant it will in turn continue to harass, cheat, and seek to either control or destroy capital. Neither at any time is willing to give the *quid pro quo*, and the never ceasing conflict goes on.

There can be no real solution of the problem, as old as our civilization, unless the foundation therefor is established by law. Labor, labor unions, or organized labor have their place and use; capital and organization thereof, likewise. But both must be made to know and to keep their respective proper places and use by law, to change only by the ever fluctuating force of supply and demand. Such a medium would prevent both extreme conservatism or autocracy, and extreme radicalism or sovietism.

Can the courts step in between capital and labor to strike the medium and balance the scales? There must be in the conflict justice somewhere, somehow, at all times. The courts cannot find the balancing point by boxing the compass of judicial opinion from extreme radicalism to ultra-conservatism. They must stand at all times as the representatives of capital, of captains of industry, devoted to the principle of individual initiative, protect property and persons

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from violence and destruction, strongly opposed to all schemes for the nationalization of industry, and yet save labor from oppression, and conciliatory toward the removal of the workers' just grievances. The prosperity of the nation depends on constructive legislation, backed up by intelligent judicial interpretation and strict enforcement.

As to the law applicable to the facts set forth in the papers submitted, this court has fully expressed its opinion in these so-called labor cases. See *Reardon, Inc.*, v. *Caton*, 107 Misc. Rep. 541. Compare *Reardon* v. *Caton*, 189 App. Div. 501; *Reardon* v. *International Mercantile Marine*, Id. 515, with *Auburn Draying Co.* v. *Waddell*, 227 N. Y. 1. It will serve no good purpose to rehash what has been declared by the appellate courts to be the respective rights and duties of the employer and the worker. The case of *Curran* v. *Galen*, 152 N. Y. 33, well expresses the same. The individual motto is, "work if you please; strike if you will." On the other hand, an employer of labor has the right to determine for himself how and under what conditions he will conduct his business. And so, as hereinbefore stated, the courts have recognized contracts imposed by the workers on their employers, exclusive in their nature, and the contracts of the employers imposed on the workers, equally exclusive in their nature, up to the point or extent, when and where, such become oppressive or a conspiracy and therefore unlawful.

The case of *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, is illuminative upon the question of respective rights of employer and employee where the facts presented are in substance similar to those here and wherein the court found that the plaintiff was entitled to the injunctive relief sought.

So far as the question of picketing is concerned,

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defendant does not deny that violence has followed as the result of the strike or lockout and that there has been picketing. The dispute is as to the sort and extent of the so-called picketing. In cases of this kind "peaceful picketing" or "mental picketing" or what-not are usually only figures of speech or exist in the imagination,—mostly mentioned, seldom met with. That there ever in reality existed, or was practiced "peaceful picketing," is a question. In the present case there was no need of picketing to inform any one that there was a strike or a lockout at the plaintiff's premises, Every one knew it. The purpose of the picketing was just as well known, and "peaceful picketing" was not in fashion or even sought to be practiced and could serve no useful purpose under the circumstances. As shown by the affidavits attached to the moving papers, the picketing as practiced herein was wholly unlawful and should be suppressed. Upon a careful consideration of all the papers and memoranda submitted, the court finds ample proof of plaintiff's claim that the defendants are guilty of the acts complained of as to calling of the strike, picketing the plaintiff's premises, interference with employees and workers of the plaintiff and with their contracts of employment, and in generally unlawfully instigating, advising and directing acts of various kinds against plaintiff and its business, from which relief should be granted by way of injunction.

Motion granted.

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GEORGE MAEURER, Plaintiff, *v.* MORSE DRY DOCK AND REPAIR COMPANY, Defendant.

(Supreme Court, Kings Special Term, March, 1921.)

Bill of particulars — when motion for, granted — negligence — Workmen's Compensation Act — Employers' Liability Act.

While plaintiff, an employee of defendant, was engaged in work, maritime in its nature, he sustained injuries to his person for which he claimed and received compensation under the Workmen's Compensation Act. In an action subsequently brought in a state court for the same injuries plaintiff claimed to be entitled to recover both by an action at common law and under the Employers' Liability Act. *Held,* that in the circumstances plaintiff's motion for a bill of particulars of his alleged contributory negligence pleaded as a defense, will be granted.

MOTION for a bill of particulars.

Smith & Reiher (George F. Palmer, Jr., of counsel), for plaintiff.

Campbell, Flaherty, Turner & Strouse (Charles J. McDermott, of counsel), for defendant.

VAN SICLEN, J. Motion by plaintiff to compel the defendant to give bill of particulars of defense, alleging contributory negligence of the plaintiff, as set forth in defendant's answer. There seems to be no dispute, and the fact is, that the plaintiff, when injured, was engaged in work, maritime in its nature; that at the time of the injury plaintiff was in the employ of the defendant and that heretofore the plaintiff made claim for and received compensation under the Workmen's Compensation Law of this state. After the decision of *Knickerbocker Ice Company* v. *Stewart,* 253 U. S. 149, the plaintiff brought action to recover for the injury received, and claims

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that he is entitled to such recovery both by an action at common law and under the Employers' Liability Act, and that he is entitled to his bill of particulars by reason of the last mentioned act. The case of *Knickerbocker Ice Company* v. *Stewart, supra,* fully and finally determines that the said Workmen's Compensation Act has no application, so that the plaintiff is now relegated to whatever right and remedy he may have had, exclusive of the Workmen's Compensation Act, at the time of his injury.

The defendant holds that, whatever right or remedy the plaintiff may show himself entitled to, he is obliged, upon the trial, to prove his freedom from contributory negligence and that, therefore, the plaintiff can, under no rule of law or statute, compel the defendant to furnish particulars of the contributory negligence alleged as a defense. Further, that by bringing action in a state court plaintiff has saved to himself only a common-law remedy and if the rule of maritime law is applied — and the courts have held that maritime law cannot be administered in the state Supreme Court (see *Johnson* v. *Standard Transportation Co.,* 188 App. Div. 934; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372), no bill of particulars, as sought, can be obtained. Having been barred under the Workmen's Compensation Act, defendant asserts plaintiff cannot, under another statute, to wit, the Employers' Liability Act, take advantage of the privileges furnished by that act.

The federal courts have recently decided what is an invasion of the exclusive jurisdiction of the federal courts over all civil and maritime causes and the saving clause to suitors in all cases and right of a common-law remedy where common law is competent to give it. *Southern Pacific Company* v. *Jensen,* 244 U. S. 205; *Clyde Steamship Co.* v. *Walker,* Id. 255;

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and *Knickerbocker Ice Co.* v. *Stewart, supra.* This does not mean, necessarily, a common-law action, but that the remedy might be by any means employed to enforce the rights or redress the injury. *Knapp, Stout & Co.* v. *McCaffrey,* 177 U. S. 638, 644. The present action being a tort case jurisdiction depends solely upon the place where the tort was committed, and under the saving clause of the federal Constitution, plaintiff contends that the remedy for the wrong or injury done him may be sought by any means employed to enforce his rights or redress the injury. Further, that the Employers' Liability Act never having been repealed, he is fully within his rights in seeking to obtain, in full, the benefits afforded thereby. *Matter of Doey* v. *Howland Co.,* 224 N. Y. 30; *Matter of Anderson* v. *Johnson Lighterage Co.,* Id. 539. Plaintiff further contends that the relief sought in no way contravenes the saving clause of the federal Constitution of the right of common-law remedy, because the Employers' Liability Act, so far as the matter at issue is concerned, is simply a question of procedure and does not create substantive rights or substantive law. *Sackheim* v. *Pigueron,* 215 N. Y. 62.

It is of immediate and great importance that the questions herein involved should be definitely settled. Many actions involving maritime law have been brought in the state courts, and a clear working rule is desired. Already cases have been decided according to the common law, maritime law, relating to wage, maintenance, and cure and also the application of the rule of comparative negligence, and have also been determined by application of the Employers' Liability Act. The circumstances are such that the motion should be granted.

Motion granted.

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UNITED TRACTION COMPANY, Plaintiff, v. JOHN SMITH, Defendant.

(Supreme Court, Albany Special Term, March, 1921.)

Injunctions — when injunctive relief granted — motor vehicle line — municipal corporations — licenses — statutes — Transportation Corporations Law, §§ 25, 26 — carriers — Penal Law, §§ 29, 1937.

One who operates a motor vehicle line in a city without first obtaining the consent of the municipal authorities and without thereafter procuring from the Public Service Commission a certificate as to the necessity and public convenience of such business, violates sections 25 and 26 of the Transportation Corporations Law.

Where one without a license so obtained operates a motor vehicle line or route over the streets of the city of Albany, Watervliet and Troy or in and along the highways connecting said cities, with vehicles for carrying passengers, in competition with another common carrier, which, as required by statute, has obtained the consent of the local authorities of said city to operate over the streets thereof, such operation without a license, will be restrained by injunction upon the application of the other common carrier.

While the failure to comply with the aforesaid provisions of the Transportation Corporations Law is a misdemeanor under section 29 of the Penal Law, punishable by fine or imprisonment or both under section 1937 thereof, the court will not compel parties whose rights are clear to rely on peace officers to protect them in their enjoyment of such rights, and may grant injunctive relief.

APPLICATION for a temporary injunction.

Sanford & Alexander, for plaintiff.

Andrew J. Nellis, for defendant.

HINMAN, J. This is an application for a temporary injunction restraining the defendant and those representing him until the further order of the court

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from operating a bus line, stage route or motor vehicle line or route in or along any of the streets, highways or public places of the cities of Albany, Watervliet and Troy, or in and along the highways connecting the said cities.

It appears from the moving papers that on March 23, 1921, the defendant drove a six passenger motor vehicle from near the post-office in Albany on the public street called Broadway, along said street to and along the public highway called the Albany and Troy road through the public streets of Watervliet, to and along a public street called River street in the city of Troy; that passengers got on and off at various points on said trip and each paid to the defendant the sum of twenty-five cents; that the defendant solicited passengers for hire on and along said route; that the vehicle had a sign bearing the words, "Albany and Troy. 25c;" that the defendant told one of the passengers in his motor vehicle on that date that he was the owner of the car and that he had been running it as a motor vehicle line for twenty-eight days from the post-office in Albany to the Manufacturers National Bank on River street in Troy, and that he intended to so run it until the trolley strike was over and that he had no license or consent by the local authorities of said cities to operate said route.

The defendant substantially concedes these facts, except that he denies saying that he was running his vehicle as a motor vehicle line, or that he was running any line whatever. This becomes immaterial, however, in view of the facts admitted, since the court must reach the conclusion under the statutes and under the decisions, that the operation of his vehicle did constitute the operation of a motor vehicle line or route, and constituted him a common carrier within the meaning of the statutes, requiring him to

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obtain a license as will be indicated by the authorities hereinafter referred to.

The following sections of the Transportation Corporations Law are applicable to this case:

"§ 25. Additional persons and corporations subject to the public service commissions law.— Any person or any corporation who or which owns or operates a stage route, bus line or motor vehicle line or route or vehicles described in the next succeeding section of this act wholly or partly upon and along any street, avenue or public place in any city shall be deemed to be included within the meaning of the term 'common carrier' as used in the public service commissions law, and shall be required to obtain a certificate of convenience and necessity for the operation of the route or vehicles proposed to be operated, and shall be subject to all the provisions of the said law applicable to common carriers."

"§ 26. Consent required.— No bus line, stage route nor motor vehicle line or route, nor any vehicle in connection therewith, nor any vehicles carrying passengers at a rate of fare of fifteen cents or less for each passenger within the limits of a city or in competition with another common carrier which is required by law to obtain the consent of the local authorities of said city to operate over the streets thereof shall be operated wholly or partly upon or along any street, avenue or public place in any city, nor receive a certificate of public convenience and necessity until the owner or owners thereof shall have procured, after public notice and a hearing, the consent of the local authorities of said city, as defined by the railroad law, to such operation, upon such terms and conditions as said local authorities may prescribe, which may include provisions covering description of route, rate of speed, compensation for wear and tear of

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pavement, improvements and bridges, safeguarding passengers and other persons using such streets, and no such operation upon the streets of any such city shall be permitted until the owner or operator of such vehicles or proposed line or route shall if required by such local authorities have executed and delivered a bond to such city in an amount fixed by said local authorities and in the form prescribed by the chief law officer of said city with sureties satisfactory to the chief fiscal officer of said city, which bond may be required to provide adequate security for the prompt payment of any sum accruing to said city, and the performance of any other obligations, under the terms and conditions of such consent, as well as adequate security for the payment by such owner of any damages occurring to, or judgments recoverable by, any person on account of the operation of such line or route, or any fault in respect thereto. The town board of any town or the board of trustees of any village may adopt a resolution providing that the provisions of this section shall apply to such town or village, and thereafter no bus line, stage route, motor vehicle line or route shall be operated, wholly or partly, upon or along any street or highway in such town or village, nor receive a certificate of public convenience and necessity until the owner or owners thereof shall have procured the consent of the local authorities of such town or village, in the same manner and subject to the same terms and conditions as is provided in this section for procuring the consent of the local authorities of the city; and for such purpose the town board of such town, in the case of a town and the board of trustees of the village in the case of a village, shall be deemed the local authorities thereof."

One who operates a motor vehicle line within a city

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without first obtaining the consent of the municipal authorities and without thereafter procuring a certificate from the public service commission as to the necessity and public convenience of such business, violates the above statute.

In the case of *Public Service Commission* v. *Hurtgan*, 91 Misc. Rep. 432 at page 435, Mr. Justice Brown graphically outlines the cases in which a license must be obtained. He states that the statute requires such consent for the operation in a city of either

"(a) A bus line,

"(b) A stage route,

"(c) A motor vehicle line or route,

"(d) A vehicle in connection with a bus line, a stage route, a motor vehicle line or route,

"(e) A vehicle carrying passengers at a rate of fare of fifteen cents or less for each passenger within the limits of a city,

"(f) A vehicle carrying passengers in competition with another common carrier which is required by law to obtain the consent of the local authorities of said city to operate over the streets thereof.

" The statute is that to lawfully operate any one of the above six specified lines, routes or vehicles, in a city the consent of the local authorities and the certificate of the Public Service Commission must be first obtained, provided such line, route or vehicles, are engaged in the business of carrying passengers for hire in the city."

The defendant seems to come under subdivisions (c) and (f) in the above analysis, since he was operating a motor vehicle line or route and was operating a vehicle carrying passengers in competition with another common carrier which is required by law to obtain the consent of the local authorities of the cities in question to operate over the streets thereof.

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This case is not a novel one in courts of this state. I have had a number of similar cases presented to me for my determination, involving a violation of the above statute in which the owner of a vehicle or vehicles operating a motor vehicle line or route, or operating a vehicle carrying passengers in competition with another common carrier has been restrained by me upon the application of the public service commission for the enforcement of this statute. No opinion has heretofore been written by me in any of these cases, for the very reason that the courts had settled the law in a number of clear and harmonious decisions.

The importance of the situation which exists in this community, however, justifies me in referring to a number of these decisions for the purpose of clarifying this situation.

In the case of *Public Service Commission* v. *Hurtgan, supra,* the defendant was operating a motor vehicle route in the city of Lockport without having applied for or having received the consent of the authorities of that city, in competition with the International Railway Company, and the court granted an injunction, restraining the defendant from further operating his motor vehicles and the carrying of passengers for hire within said city.

In the case of *Public Service Commission* v. *Fox,* 96 Misc. Rep. 283, the defendant operated a horse drawn vehicle carrying passengers at a rate of fare of fifteen cents or less, through the streets of Elmira. Regular trips were made. The defendant attempted to justify his operation by showing that his passengers were employees and only the employees of a certain manufacturing plant, and that these employees had formed a mutual transportation club, each paying when he rode a fare of five cents. The

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court enjoined the defendant in that case as a violation of the statute for failure to procure the consent of the local authorities, and also the certificate from the public service commission, holding that the requirements of the statute could not be ignored even under such circumstances.

In the case of *Public Service Commission* v. *Mt. Vernon Taxicab Co.*, 101 Misc. Rep. 497, the court enjoined the operation of defendant's auto bus line between the city of Mt. Vernon and Rye Beach, because it was in competition with another common carrier and because it was operating without the consent of the local authorities of the cities of Mt. Vernon and New Rochelle, and that the certificate of public convenience and necessity from the public service commission is required by the statute. In that case the court said: "The operation of the buses carrying about twenty people each on a regular line or route is altogether different than an ordinary taxicab service where vehicles are operated upon no regular route but take patrons anywhere they choose to go."

In the case of *Niagara Gorge R. R. Co.* v. *Gaiser*, 109 Misc. Rep. 38, an action was commenced to restrict the operation by the defendant of a bus line through the village of Lewiston, Niagara county, as a part of a route paralleling the plaintiff's railroad from a certain street in the city of Niagara Falls to the village of Lewiston. It was held that by section 25 of the Transportation Corporations Law, one who operates a bus line over a route in a city is deemed a common carrier within the Public Service Commissions Law and must obtain a certificate for the operation of the route or vehicles proposed to be operated, and must also obtain a certificate of public convenience and necessity from the public service com-

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mission before exercising a franchise granted by a municipality. An injunction was granted restraining the defendant from operating his bus line so far as he had failed to obtain a certificate from the public service commission, upon the ground that the operation of the bus line violated the statute and resulted in damage and injury to the railroad company, for which it had no adequate remedy at law. It is to be noted that this action was brought by the railroad company and not by the public service commission.

In the case of *Public Service Commission* v. *Booth*, 170 App. Div. 590, the defendant had been operating a bus line before the statute in question was passed and he claimed that the statute requiring a certificate from the public service commission did not apply to him as he was already operating under a license from the city. The court held that even in that case the defendant was prevented from operating his bus line until he had complied with the terms of the statute by obtaining a certificate of public convenience and necessity from the public service commission.

In the case of *Brooklyn City R. R. Co.* v. *Whalen*, 191 App. Div. 737, the plaintiff, a street railway company, owned and operated lines of surface cars in Brooklyn, and in the fall of 1919 the board of estimate and apportionment of the city of New York authorized the defendant, as commissioner of plant and structures of the city, to operate motor vehicles for the carrying of passengers on certain prescribed routes. The city authorities contended that the maintenance of the bus line was justifiable because of emergency, putting forward the inadequacy of the service of the street railway lines as creating such emergency. The court condemned the procedure adopted, calling attention to the fact that the city had, in plain disregard of the statute, without grant-

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ing a franchise, authorized individuals to run auto buses on established routes through the streets for their own profit. The court said, at page 743:

"If the welfare and convenience of the citizens require additional accommodations for transit such as would be furnished by established stage routes, there is a legal way to accomplish the result. The city has power to grant a franchise, subject to the determination of its necessity and convenience. But the city has no power of municipal operation; nor has it the right to authorize others so to use the streets without observing the conditions to a legal and regular grant of a franchise.

"The plaintiff plainly suffers a special injury from the competition of these stage lines and from the added obstruction to the operation of its cars under its franchise. Even if the purpose of establishing the lines is not to injure the plaintiff in the exercise of its legal rights, it has that effect. Moreover, no bus line can be established in streets occupied by the plaintiff unless a certificate of convenience and necessity be secured, and upon an application for such certificate the plaintiff has a right to be heard. * * * A common carrier, therefore, has a legal right to question the necessity and convenience to the people of a paralleling common carrier. * * * The plaintiff, having a franchise to operate in the public streets, and being under financial pressure of the prevailing economic conditions, suddenly finds its most profitable lines paralleled by stages operating under the control of the defendant without authority of law and without having obtained a certificate of public convenience and necessity. I think the plaintiff has a standing in a court of equity for relief.

"Whether the plaintiff has failed in fulfilling the obligations of its franchise has nothing to do with

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the question now before us. If it has, the law affords a remedy. The orderly processes of the law are better and probably more effective than an attempt at correction by an unauthorized and illegal administrative act."

No further citation of authorities is needed to demonstrate that the plaintiff is entitled to the injunction sought herein. It seems desirable, however, in view of the multiplicity of similar instances in which the statute in question is being violated in this community, so openly and continuously that the court may take judicial notice of it, that attention should be called to the fact that failure to comply with such statute is a violation of the Penal Law.

Section 29 of the Penal Law provides as follows:

"§ 29. Violation of statute which imposes no penalty is a misdemeanor. Where the performance of any act is prohibited by a statute, and no penalty for the violation of such statute is imposed in any statute, the doing such act is a misdemeanor."

Section 1937 of the Penal Law provides as follows:

"§ 1937. Punishment of misdemeanors when not fixed by statute. A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this chapter, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

In other words an act expressly prohibited by the public statute is in its inception and always must continue to be, unlawful, and where the performance of any act is prohibited by a statute and no penalty for the violation of such statute is imposed in any statute, the doing of such act is a misdemeanor, punishable

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by imprisonment for not more than one year, or by a fine of not more than $500, or both. *Keller* v. *Erie R. R. Co.*, 183 N. Y. 67; *Marra* v. *N. Y. C. & H. R. R. R. Co.*, 139 App. Div. 707.

While the regular remedy for the prosecution of those who violate the Penal Laws of the state lies in arrest and punishment, the court will not compel parties whose rights are clear to rely on peace officers to protect them in their enjoyment of those rights. "There is a preventive as well as a remedial justice." *Green Island Ice Co.* v. *Norton*, 42 Misc. Rep. 238; affd., 105 App. Div. 331; 189 N. Y. 529; *City of New York* v. *New Jersey & S. I. Ferry Co.*, 173 App. Div. 496.

Every argument that could be advanced here in favor of permitting the jitneys to run without a license upon the streets of the cities here affected has been conclusively answered by the Appellate Division in the case of *Brooklyn City Railroad Co.* v. *Whalen*, from which I have quoted. There the court said:

"If the welfare and convenience of the citizens require additional accommodations for transit, * * * there is a legal way to accomplish the result."

The city had no right to provide municipal bus lines nor did it have the right to authorize others so to use the streets without observing the conditions of the law requiring the issuance of a license.

"Whether the plaintiff has failed in fulfilling the obligations of its franchise has nothing to do with the question;" that if the railway company had failed in its obligations, the law affords a remedy.

And finally, the court announced what seems to me must be recognized by thoughtful people everywhere as the only safe and sane rule of conduct in these emergencies, when it said that the orderly processes of the law are better and probably more effective than

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an attempt at correction by an unauthorized and illegal act.

I cannot help referring here to what President Thomas Jefferson said in his first inaugural address when he stated that he believed this the strongest government on earth. He said: "I believe it the only one, where every man, at the call of the law, would fly to the standard of the law and would meet invasions of the public order as his own personal concern." He said that we can tolerate error of opinion in this country so long as reason is left free to combat it. If that is the sentiment of every law abiding citizen and of every public officer charged with the duty to preserve order and carry out the orderly processes of the law, as I thoroughly believe it is, the controversy here will be settled in accordance with our best traditions.

The plaintiff is entitled to the injunction sought herein.

Application granted.

Matter of the Application for Letters of Administration on the Goods, Chattels and Credits of FLORENCE P. McGUIRE, Deceased.

(Surrogate's Court, Bronx County, March, 1921.)

Guardians — infants — guardian of property has preference over guardian of person in being appointed administrator.

The guardian of the estate of an infant, who is the sole surviving next of kin of his deceased mother, will be appointed

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administrator of her goods, chattels and credits in preference to another who, as the guardian of the infant's person, has no authority to receive, hold or manage the infant's property.

PROCEEDINGS on application of a guardian of an infant for appointment as administrator of the estate of the infant's mother.

Edward J. McGuire, for petitioner, Irving National Bank.

Francis S. McAvoy (George H. Taylor, Jr., of counsel), for petitioner, Mary L. O'Sullivan.

SCHULZ, S. The guardian of the estate of an infant applied for appointment as administrator of the goods, etc., of his deceased mother of whom such infant is the sole surviving next of kin. The guardian of the infant's person files a similar petition praying for her appointment.

After stating the order in which administration shall be granted upon estates of a decedent, section 2588 of the Code of Civil Procedure, so far as material to this controversy, provides that "If a person entitled to take all the personal estate is an infant, * * * his guardian * * * shall have a prior right to letters in his place and stead." The infant in question being the sole next of kin of the decedent and being entitled therefore to take all of her personal estate (Decedent Estate Law [Cons. Laws, ch. XIII], § 98, subd. 4) it follows that his guardian is entitled to such appointment.

The term *guardian* as used in chapter XVIII of the Code applies to general guardians and a general guardian is stated to be "one appointed by the supreme, or surrogate's court, for an infant, either over or under fourteen years of age." Code Civ. Pro. § 2642. The Surrogate's Court has jurisdiction to appoint a general guardian of the person or of the

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property or both. Code Civ. Pro. § 2643. As both of the guardians were appointed by the Surrogate's Court they are both general guardians, and hence the term guardian as used in section 2588 applies to them.

As the guardianship of the person and the guardianship of the estate, however, are not lodged in the same individual or corporation, the question presented is which of the guardians is entitled to such appointment as administrator, or if both are so entitled, which one should have a preference over the other. I have been unable to find any reported decision in which the matter has been determined and none has been drawn to my attention.

From an examination of section 2588, *supra*, it is evident that the right to appointment has been made dependent upon the right to take or share in the personal property of the decedent.

While it was held in *Matter of D'Adamo*, 212 N. Y. 214, that the decision in *Lathrop* v. *Smith*, 35 Barb. 64; 24 N. Y. 417, to the effect that an interest in the estate was not a prerequisite to appointment, was applicable to section 2660 of the Code of Civil Procedure, the latter being the section now known as section 2588, the learned judge writing the opinion stated that radical changes had been made by the revision of 1914 (Laws of 1914, chap. 443) and that the result of such amendments will be to establish a new rule hereafter. This further appears from the note to the section in question contained in the report of the commission to revise the practice and procedure in Surrogates' Courts transmitted to the legislature on February 9, 1914, in which it is stated that "The general intention of the changes is to give only persons interested the right to administer." As a general rule it is also to be observed that the order of appointment depends, with one or two exceptions, upon the size of the shares to which the respective next

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of kin are entitled. This is confirmed in subdivision 8 of the section in question to the effect that among the next of kin other than those named in subdivisions 1–7, preference shall be given to persons entitled to take the largest share in the estate.

The guardian of the estate of the infant is entitled to receive and to hold and conserve the property of the infant and in that capacity would be entitled to receive the distributive share to which the said infant is entitled out of the estate of his deceased mother. The guardian of the infant's person has no authority by virtue of her position as such to receive, hold or manage the infant's property. I am therefore of the opinion that under the sections of the code above referred to, the guardian of the estate of this infant has a preference in appointment over the guardian of the person. If it be assumed, however, that no such preference exists and that both of these guardians have an equal right to such appointment, then in view of the facts above stated and because the guardian of the estate is also the executor of and trustee under the last will and testament of the deceased father of the infant and that its appointment will prevent the necessity of giving a bond, tend to facilitate the administration of the estate and keep down the expenses of such administration, I feel that the best interests of all concerned will be served by appointing such guardian as administrator under the provisions of section 2588, *supra;* that "if there are several persons equally entitled to administration, the surrogate may grant letters to one or more of such persons."

The application of the guardian of the estate of the infant will, therefore, be granted and that of the person of the infant denied.

Decreed accordingly.

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MICHAEL GLASSER, Plaintiff, *v.* THE CITY OF BUFFALO, AGNES PHILLIPS and Others, Defendants.

(Supreme Court, Erie Equity Term, April, 1921.)

City of Buffalo — charter of 1916, § 264(3) — constitutional law — statutes — police — injunctions — pensions — State Constitution, art. VIII, § 10 — Laws of 1895, chap. 137.

The provision of section 264(3) of the 1916 charter of the city of Buffalo, that the common council, in its discretion, may grant a pension to widows of deceased members of the police force, etc., is in violation of section 10 of article 8 of the constitution of the state.

Where a member of the police force of the city of Buffalo was retired on a pension in 1897, and died five years later, the plaintiff in an action to enjoin the payment of a pension granted to his widow in 1919, by the trustees of the police pension fund, will be granted the relief prayed for.

The widow can have no relief under the statute (Laws of 1895, chap. 137) which confines the granting of such pensions to cases "where death or retirement has occurred prior to the passage of this act."

ACTION for an injunction.

Frederick O. Bissell, for plaintiff.

William S. Rann, for city and others.

Paul Sheehan, for defendant Agnes Phillips.

WHEELER, J. The plaintiff seeks to enjoin the trustees of the police pension fund of the city of Buffalo from paying to the defendant Agnes Phillips a pension granted on September 26, 1919. She is the widow of William G. Phillips, who was a member of the Buffalo police force from 1869 until February 17, 1897,

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when he was retired on a pension. On August 28, 1902, Phillips died. On September 26, 1919, after a hearing the trustees of the pension fund granted Mrs. Phillips a pension. This was granted pursuant to the authority of subdivision 3 of section 264 of the charter of the city of Buffalo, providing among other things as follows: "And the council may, in its discretion, and by a majority vote and in accordance with the provisions of this act, grant pensions to widows of deceased members of the police force, and to annuitants under the police life insurance fund or police pension fund, where death or retirement has occurred prior to the passage of this act, and has been caused by disability acquired in the service of the department.".

There is no claim but that the council had authority to grant the pension attacked provided the act is constitutional. It is claimed, however, that the act is unconstitutional, and violates the provisions of article III, section 28, of the State Constitution, reading as follows: " The legislature shall not, nor shall the common council of any city, nor any board of supervisors grant any extra compensation to any public officer, servant, agent or contractor."

We think, however, that section 10 of article VIII of the Constitution of the state is more applicable. This provides, " No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual," etc.

The only legislative authority we can find undertaking to empower the board of trustees of the police pension fund to grant annuity to persons situated as Mrs. Phillips is, is that contained in subdivision 3 of section 264 of the present charter of the city of Buffalo, which went into operation in 1916, fourteen years after the death of Captain Phillips.

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It is true that by chapter 137 of the Laws of 1895, amending the charter of the city of Buffalo, relating to the police pension fund of the city the trustees of that fund were authorized in their discretion to "grant pensions to widows of deceased members, and to annuitants under the police life insurance fund where death or retirement has occurred prior to the passage of this act, and has been caused by disability acquired in the service of the department."

It however will be noted that such pensions to widows are by the very terms of the act confined to cases "*where death or retirement has occurred prior to the passage of this act,*" which became a law in 1895. It could not inure to the benefit of Mrs. Phillips, because her husband was not retired until 1897. Consequently from the date of his retirement in 1897, or death in 1902, there was nothing on the statute books authorizing any pension or annuity to her.

The revised charter of the city of Buffalo, passed in 1916, did contain the provision quoted ostensibly conferring the power to pension Mrs. Phillips.

We are however of the opinion that in this particular the statute is unconstitutional and void.

Similar statutes have been condemned by the Court of Appeals. *People ex rel. Waddy* v. *Partridge,* 172 N. Y. 305; *Mahon* v. *Board of Education,* 171 id. 263; *Bush* v. *Board of Supervisors,* 159 id. 212.

The police pension fund is a public fund. *Mahon* v. *Board of Education,* 171 N. Y. 265.

When the board of trustees of that fund voted an annuity to Mrs. Phillips they were giving away public moneys to one who had no possible claim to them by reason of any law existing at the time of her husband's retirement or at the time of his death. Such an appropriation of the pension fund violated the provisions of the Constitution quoted, and is an unlaw-

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ful act against which a taxpayer may maintain an action.

The theory of the law is that unless Captain Phillips at the time of his retirement or at the time of his death had some vested or contract right to pension or annuity for his widow the payment of such an annuity from public funds is a mere gratuity to the beneficiary, forbidden by the Constitution.

We reach the conclusion that the plaintiff is entitled to a decree for the relief asked, without costs however of this action.

Ordered accordingly.

MICHAEL GLASSER, Plaintiff, *v.* THE CITY OF BUFFALO, CLARA WINKEN et al., Defendants.

(Supreme Court, Erie Equity Term, April, 1921).

Injunctions — when action to enjoin payment of pension dismissed — charter, city of Buffalo, § 264(1) — police.

A member of the police force of the city of Buffalo was detailed for duty at the car shops of the New York Central Railroad Company during a strike, and availing himself while on duty, of permission granted by his superior officer, to eat at the commissariat or lunch counter provided by the railroad company for its employees, partook of food which produced ptomaine poisoning, from which he died, as found by the trustees of the police pension fund. In an action to enjoin payment of a pension granted to said member's widow, *held,* that he died from the effects of "an injury while in the actual discharge" of his duties as a police officer within the meaning of section 264(1) of the city charter, and the complaint in an action to enjoin payment of the pension will be dismissed, but without costs.

ACTION for an injunction.

Frederick O. Bissell, for plaintiff.

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Joseph Roemhild, Jr., for defendant Clara Winken.

W. S. Rann, corporation counsel, for city and others.

WHEELER, J. This is an action to enjoin the defendants as trustees of the police pension fund of the city of Buffalo, from paying from said fund a pension to the defendant Clara R. Winken, the widow of Robert J. Winken, who at the time of his death was a member of the police force of the city. It is claimed the granting and payment of such pension is unauthorized by law. Robert J. Winken had been detailed by his superior officers to do duty during the pendency of a labor strike at the shops of the New York Central Railroad Company. He was on duty thirteen hours — one day he would be at the station house from six to twelve midnight and at the car shops from twelve to seven. The next night he was at the shops from six to twelve midnight, and at the station house from twelve to seven in the morning. The patrolmen stationed at the car shops had no place to get anything to eat except at the commissariat or lunch counter provided by the railroad company for its employees. The matter of meals was the subject of discussion between these patrolmen and their superior officer, and they were told if they could arrange to get something to eat at the railroad commissariat their superior officer had no objection to their so doing. Winken, it seems, availed himself of this permission and one night partook of food there, which produced ptomaine poisoning from which he died. Such was the claim made before the trustees of the pension fund, and there was sufficient evidence before that board to justify them in so finding. The board of trustees of that fund accordingly granted Winken's widow a pension, payable from the fund. It is contended that charter pro-

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visions under which they acted gave them no authority to grant this pension.

Whatever authority the board possessed is derived from subdivision 1 of section 264 of the charter. The board is authorized to grant pensions "To the widow of any member of the police force * * * who shall have been killed while in the actual performance of duty, as such member or employee, *or who shall have died from the effects of any injury received, while in the actual discharge of such duty,*" etc.

The question then is, did Winken die "*from the effects of an injury while in the actual discharge*" of his duties as a police officer.

The case presented is a border one. We fully appreciate strong arguments can be presented in support of the positions taken by opposing counsel. It is true the city of Buffalo was not required by law to furnish meals to members of the police force, nevertheless Winken had been detailed for duty at a place, and during hours, away from his home where it was practically impossible for him to obtain food, unless it was procured at the railroad commissariat at the shops where he was stationed. It was necessary for him to eat to properly discharge those duties, and we think it may be fairly said in eating under those circumstances he was in fact in the "*actual discharge*" of his duty as policeman. I do not think it can be contended that the "injury" received in order to justify a pension need be physical violence. That would be too narrow a construction of the language used.

We are cited no case where the precise situation presented in this case has been passed on by the court. It is hardly to be expected one can be found. We know, however, that in construing the employers' compensation laws of the various states the courts have

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been disposed to be liberal in their construction of such statutes as to what constitutes "course of employment."

We are of the opinion the trustees of the police pension fund acted within their powers in awarding a pension to Mrs. Winken.

Other questions have been raised and argued by counsel as to the right of the plaintiff to maintain this action. In view, however, of the disposition made it becomes unnecessary now to discuss those questions.

We think the plaintiff's complaint should be dismissed, but without costs.

Ordered accordingly.

THE CITY OF NEW YORK, Plaintiff, *v.* THE BROOKLYN CITY RAILROAD COMPANY, Defendant.

(Supreme Court, Kings Special Term for Motions, April, 1921.)

Bridges — statutes — right of city of New York to operate railroad over Williamsburg bridge — municipal corporations — railroads — constitutional law — Greater New York Charter, as amended in 1901, § 595(5) — Public Service Commissions Law, § 53 — Railroad Law, § 22 — Laws of 1916, chap. 528 — Laws of 1897, chap. 663.

The provision of section 595(5) of the Greater New York Charter, as amended in 1901, by which the commissioner of bridges, who still had the management and maintenance of the New York and Brooklyn bridge and control of the operation of the railroad thereon, was given in general terms the management of all other bridges, was followed by an express provision abolishing the Williamsburg bridge commission, and all its powers and duties, one of which was to operate and authorize to be operated a railroad over said bridge, were duly transferred to the commissioner of bridges of the city of New York and by a later statute (Laws of 1916, chap. 528) to the commissioner of plants and structures of said city. (Pp. 101, 102.)

The legislative act (Laws of 1897, chap. 663) which provided that the trustees of the Brooklyn bridge might continue to

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maintain and operate the then present railroad thereon did not limit the power already delegated the Williamsburg bridge commission, which in turn is devolved upon the present commissioner of plant and structures, and the city of New York through that official has an existing right to operate a railroad on the Williamsburg bridge. (P. 102.)

Dilluvio v. *City of New York*, 73 Misc. Rep. 122, distinguished. (P. 103.)

The legislature having granted to the city of New York the right to operate a railroad on said bridge and there being no place thereon for the storage of cars it must be held that as a necessary implication to such grant the city may erect a barn underneath the structure of the bridge and by necessary trackage connect the existing bridge tracks with the barn, and if in the course of making such connection it is necessary to cross the tracks of the defendant railroad company now operating over the bridge as licensee only and free to abandon the bridge service at any time, the law allows such crossing over. (P. 104.)

An application by the city of New York under section 22 of the Railroad Law for the appointment of commissioners to determine the compensation, if any, to be awarded defendant as a condition of constructing a cross over on its tracks, etc., will be granted and the obtaining of a certificate under section 53 of the Public Service Commissions Law is not a necessary prerequisite. (Id.)

The legislature has constitutional power to grant to a municipal corporation the right to operate a railroad on the Williamsburg bridge, which, besides being an aerial highway, has been declared by statute to be a public highway. (P. 105.)

APPLICATION by city of New York for the appointment of three commissioners under section 22 of the Railroad Law.

John P. O'Brien, corporation counsel (Joseph A. Devery, Alex I. Hahn, of counsel), for plaintiff.

Cullen & Dykman (William N. Dykman, Sigourney B. Olney, of counsel), for defendant.

KELBY, J. Application by the city of New York, under section 22 of the Railroad Law, for the appointment of three commissioners to determine the amount

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of compensation, if any, to be awarded the defendant as a condition of constructing a cross-over on the defendant's railroad tracks, and to determine the line or lines, grade or grades, points or manner of such connection, as provided in said statute. The city owns the Williamsburg bridge and owns the railroad tracks constructed upon it. The Williamsburg bridge was opened in 1904, and since that time surface railroad companies of both Brooklyn and Manhattan have operated the local and through service over the city's railroad tracks on said bridge. The fare on the local lines operated over the said bridge is at present three tickets for five cents and upon the cars operating a through service from points in Brooklyn to Manhattan or *vice versa* no extra fare is collected from passengers. Originally there were contracts entered into between the city and the operating railroad companies which have since been terminated, and the railroad companies now operating over said bridge are doing so as licensees only, subject to being ejected by the city without notice at any time, and, on the other hand, the railroads are free to abandon the bridge service at any time, they having no franchise on the bridge and being subject to no contractual liability to operate over the bridge. On April 27, 1920, the board of aldermen adopted an ordinance, which was duly approved by the mayor of the city of New York on May 3, 1920, which in effect said that after the termination of any existing right no permit should be granted to or any contract entered into with any person or corporation allowing such person to operate cars on the tracks owned by the city of New York over the Williamsburg bridge and the approaches on the route known as the bridge local service and at that time operated by the Bridge Operating Company. It was further declared in said ordinance that immediately after the

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termination of then existing permits all the said transportation service over the said bridge local route should be operated directly by the city of New York and the department of plant and structures was designated as the agency for the city in the operation of such service. It was further declared as the policy of the city authorities that the fare to be charged for passage on the cars so to be operated by the city should "in no case be fixed at a sum greater than the amount necessary to cover the cost of operation of such service, plus the necessary reserve for sinking funds and depreciation." By subsequent ordinances the commissioner of plant and structures was authorized, after provision for funds had been made, to enter into contracts for the construction of a barn and for the laying of rails from the Brooklyn plaza of the Williamsburg bridge to the barn, and for the purchase of cars, and also agreements for supplying the electrical current; all in connection with the operation of the local line on the Williamsburg bridge, with a limitation that the amount involved should not exceed $300,000. Thereafter the comptroller of the city of New York was authorized to issue corporate stock in amount not exceeding $300,000, to be applied for the purchase of trolley cars, extra parts, constructing new car barn, and other necessary equipment for the purpose of operating a local trolley line on the Williamsburg bridge. Subsequently the board of estimate amended a preceding resolution on September 24, 1920, and in this resolution declared that the proposed improvement was determined to have substantial present or prospective earning power. The moving papers show that the city purchased cars and that it is now constructing a car barn under the structure of the Williamsburg bridge between Bedford avenue and Berry street, and that it is constructing a single track

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along the side of the said bridge for the purpose of connecting the city owned track on the bridge with the city barn now in construction. To do this it will be necessary, it is alleged, to lay the city's tracks across the tracks of the defendant company, located on Driggs avenue and Bedford avenue, and which streets pass under the existing structure of the Williamsburg bridge. It is further alleged that the parties cannot agree upon the amount of compensation to be paid for the crossing or upon the line or lines, grade or grades, points or manner of such crossings or intersections. On the part of the defendant it is alleged (1) that neither the city nor the commissioner of plant and structures has any franchise or power or authority to operate a railroad over the Williamsburg bridge; (2) that the city has not, nor has Mr. Whalen, commissioner of plant and structures, obtained a certificate of convenience and necessity, required by section 9 of the Railroad Law, or the permission and approval required by section 53 of the Public Service Commissions Law, and, finally, it is contended by the defendant that any legislative delegation of power to the city to operate a railroad would be and is unconstitutional because of the prohibition contained in the state Constitution in article VIII, section 10. Taking up these positions in their order, we first discuss the power of the city to operate a railroad on the Williamsburg bridge. The construction of the Williamsburg bridge was authorized by an act of the legislature which became a law on May 27, 1895. This act provided for the appointment of three commissioners by the mayor of the then city of New York and three commissioners by the mayor of the then city of Brooklyn, which six commissioners with the respective mayors of both cities constituted a commission for the purpose of constructing the Williamsburg bridge. These commissioners

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were authorized to prepare a plan for the bridge, were given powers to take over property by eminent domain, and the right to acquire the land under water also. The act also prescribed that if any corporation should possess a valid charter with authority to construct a bridge such as was contemplated by the provisions of this act, that the commissioners, with the express consent of the mayors and comptrollers of the respective cities, might purchase said charter at a price to be mutually agreed upon, *and thereby to take or extinguish any existing right of such corporation to operate any railroad across said bridge. But nothing in this act contained shall prevent said commissioners, in their discretion, from contracting with any corporation to operate a railroad across said bridge if said commissioners shall determine it to be in the public interest.* Section 7 of said act then prescribed as follows: "When the said bridge shall be completed the said commissioners shall make their final report. * * * and they shall file all their records and papers in the office of the trustees of the New York and Brooklyn bridge (the old Brooklyn bridge). The said bridge shall thereupon be and become a public highway for the purpose of rendering travel between the cities of New York and Brooklyn safe and certain at all times, *and the care, management and control thereof shall be vested in the trustees of the New York and Brooklyn bridge, * * * who shall possess in relation thereto like powers as are vested in them in relation to the said New York and Brooklyn bridge.*" It will also be observed that these powers were not to be exercised by the trustees of the Brooklyn bridge until the completion of the Williamsburg bridge. Subsequently, in 1896, section 7, above quoted, was amended by chapter 612 of the Laws of 1896, and the main change is found in the following words: "The said

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bridge shall thereupon be and become a public highway for the purpose of rendering travel between the cities of New York and Brooklyn safe and certain at all times, and the care, management and control thereof shall be vested in the said commissioners and their successors, *who shall possess in relation thereto like powers as are at the time of the passage of this act vested in the trustees of the New York and Brooklyn bridge in relation to the said New York and Brooklyn bridge, unless the legislature shall otherwise provide therefor.*" Early in the year 1896 a taypayer's action was commenced by William Gordon against the then mayor of the city of New York and others to annul a certain contract whereby the commissioners of the Williamsburg bridge agreed to purchase a franchise possessed by the East River Bridge Company. In the course of the opinion in this case the Appellate Division of this department (3 App. Div. 395) held that a clause in the contract did not purport to grant the use of the tracks on the bridge to any corporation; that it related to the plan and construction of the bridge solely and had no relation to the operation or use of the railroad tracks after the bridge was completed. And it was further held that section 5 of chapter 789 of the Laws of 1895 grants to the commissioners the power to contract with any corporation to operate a railroad across said bridge, and that such power, if exercised at all, must be exercised during the period of construction, because, under section 7 of the act just quoted, upon the completion of the bridge the management and control became vested in the trustees of the old Brooklyn bridge. The legal effect then of this amendatory act of chapter 612, Laws of 1896, was to vest in the Williamsburg bridge commissioners powers not only during the construction of the bridge, but also powers

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continuing upon the completion of the bridge, and gave to the said Williamsburg bridge commissioners, after completion of the bridge, the same powers as were exercised by the trustees of the old Brooklyn bridge over the said old Brooklyn bridge, and that the powers so delegated were the powers exercised by the Brooklyn bridge trustees over the Brooklyn bridge itself as of the date of the passage of the act, namely, May 13, 1896. A pertinent inquiry at this time therefore is, what powers did the trustees of the old Brooklyn bridge on May 13, 1896, exercise over the old Brooklyn bridge? The answer to this query is found in chapter 300 of the Laws of 1875, section 7: "The said trustees shall have power to fix the rates of toll for persons, vehicles and animals of every kind and description passing over the said bridge; *and may operate and authorize to be operated, a railroad or railroads over said bridge,* and fix the fare to be paid by any passenger on any railroad operated by them." The powers thus devolved on the trustees of the Brooklyn bridge were continued by the Consolidation Act (Laws of 1882, chap. 410, § 1980). The original charter of the city of New York, passed in 1897, being Laws of 1897, chapter 378, section 595, provides in substance as follows: The commissioner of bridges shall have cognizance and control of the management and maintenance of the New York and Brooklyn bridge, of the operation of the railroad on the New York and Brooklyn bridge, and of the construction, repair, maintenance and management of all other bridges except "The East River Bridge" (that is, the Williamsburg bridge). And the reason for this exception was that the Williamsburg bridge commission was still in existence and the Williamsburg bridge was still in the course of construction. The charter was amended in 1901, and by section 595

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the commissioner of bridges still had the management and maintenance of the New York and Brooklyn bridge and had control "of the operation of the railroad on the New York and Brooklyn bridge." And in subdivision 5 "the bridge commissioner was given, in general terms, the management of all other bridges." This is followed by an express statement that the Williamsburg bridge commission "is hereby abolished, and all its powers and duties are hereby devolved upon the Commissioner of Bridges of the City of New York." From the foregoing it seems reasonably clear that the Williamsburg bridge commission had the power to operate and authorize to be operated a railroad over the Williamsburg bridge, and that this power has been duly transferred to the commissioner of bridges of the city of New York, and by chapter 528 of the Laws of 1916 to the commissioner of plant and structures. The act of the legislature, cited by the defendants, namely, chapter 663 of the Laws of 1897, regulating the carriage of passengers across the New York and Brooklyn bridge, has not been overlooked. That, in effect, stated that the trustees of the Brooklyn bridge might continue to maintain and "to operate the present railroad on said bridge." This act does not limit the power already delegated the Williamsburg bridge commission, which in turn is devolved upon the present commissioner of plant and structures of the city of New York. It is therefore concluded that the city of New York, through its commissioner of plant and structures, has an existing right to operate a railroad on the Williamsburg bridge. While this express question has not been before the court, the analogous question as to whether the bridge commissioner could make a contract for the operation of street surface cars over the Williamsburg bridge has been decided. In the

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case of *Schinzel* v. *Best*, 45 Misc. Rep. 455, it was held that such a contract was a valid one, and that the bridge commissioner had full power to make such contract. And while any expressions in the opinion as to the powers to operate a railroad are dicta merely and not binding upon the court, still they are persuasive in their argument and were adopted by the Appellate Division in confirming the judgment on the opinion of Judge Maddox at Special Term (109 App. Div. 917). As to the case of *Dilluvio* v. *City of New York*, 73 Misc. Rep. 122, that action involved the power of the city to operate a railroad over the Queensboro bridge, and the decision in that case was undoubtedly correct, holding that the city had no such power. But there is no such devolution of powers found in the statutes with reference to the Queensboro bridge as have been cited in support of such power in relation to the Williamsburg bridge. There is, therefore, the resulting anomaly that the city has the power to operate a railroad on the Brooklyn bridge and upon the Williamsburg bridge, but no power to operate a railroad on the Queensboro bridge. The next question presented is "Must the city, with the power to operate a railroad, first obtain a certificate of convenience and necessity, as required by section 9 of the Railroad Law, or the permission and approval required by section 53 of the Public Service Commissions Law?" There can be no doubt that if the city of New York embarks in the railroad business that it must do so subject to the limitations of the legislature as found in the Railroad Law. The city becomes a common carrier and has no greater rights, nor can it escape any liability of a common carrier. It has been held that the grant of a street railroad franchise carries with it by implication the right to maintain sidings and switches and that a

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spur necessary to enable a railroad to connect with a storehouse for its cars without which the line could not be operated at all was also a right incident to the grant. See *Brooklyn Heights R. R. Co.* v. *City of Brooklyn*, 152 N. Y. 244; *Brooklyn Heights R. R. Co.* v. *Steers*, 213 id. 76, 81. It, therefore, follows that the legislature having conferred the right to operate a railroad over the Williamsburg bridge to the city of New York, there being no place on the bridge for the storage of cars, that as a necessary implication to this grant the city may erect a barn underneath the structure of the bridge and by necessary trackage connect the existing bridge tracks with the barn. If in the course of making this connection it is necessary to cross over the tracks of the defendant the law allows such crossing over. In the case of *Village of Ft. Edward* v. *Hudson Valley R. R. Co.*, 192 N. Y. 139, it was held that a certificate under section 53 of the Public Service Commissions Law is not necessary where a railroad is constructing a crossing under section 22 of the Railroad Law. It is concluded, therefore, that no such certificate is necessary in this case and that the public service commission has correctly passed upon the proposition in the instant case when application was made to it. There remains, then, solely the question as to whether the legislature has the power to grant to a municipal corporation the right to operate a railroad. Such a grant, it is claimed, is in violation of article VIII, section 10, of the state Constitution, which, among other things, provides: "Nor shall any city be allowed to incur any indebtedness except for city purposes." This question was considered by the Court of Appeals in the case of *Sun Printing & Publishing Co.* v. *City of New York*, 152 N. Y. 257. There in substance it was held that a subway was a subterra-

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nean highway. If a subway is a subterranean highway it seems equally clear that a bridge is an aerial highway. Moreover, there is an express legislative declaration that the Williamsburg bridge is a public highway. With the proposed policy of the commissioner of plant and structures and the city authorities in operating this railroad the court has nothing to do. It seems fairly apparent at this time that the immediate result of operating the railroad over the Williamsburg bridge by the city of New York will be to cause the discontinuance of all existing service of the various trolley lines now operating over said bridge. The commissioner of plant and structures thinks that this is a result to be attained and that much good will flow to the public by the operation of the city line. The existing trolley railroads contend that they cannot compete with the city at a cut price contemplated by the city, which, by the resolution of the city authorities, is limited to cost plus sinking fund charge. If the results in the future are that the public comfort and convenience are greatly increased, clearly the credit for such increase of comfort should be accorded to the city authorities. It is equally apparent that if the result is an increase of present discomfort and confusion, so that we have confusion worse confounded, then the blame for this result can readily be traced. This is not a function of the court. This is purely an executive function and the responsibility lies upon the officers of the city and not upon the court. An order may be entered appointing three commissioners under the statute.

Ordered accordingly.

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JAMES A. STILLMAN, Plaintiff, *v.* ANNE U. STILLMAN, and GUY STILLMAN, Defendants.

(Supreme Court, Dutchess Special Term, April, 1921.)

Evidence — what are confidential communications — letters — husband and wife — divorce — Code Civ. Pro. § 831.

Letters between husband and wife are confidential communications and their contents may not be disclosed unless the privilege is waived.

A letter from a wife to her husband, which is a confidential communication and within the prohibition of section 831 of the Code of Civil Procedure, may not be considered, over her objection, upon a motion for alimony and counsel fees in the husband's action for a divorce.

Matters concerning which plaintiff cannot testify to on the trial, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, under section 831 of the Code of Civil Procedure, he will not be permitted to put into his affidavit filed in opposition to a motion for alimony and counsel fees, when defendant objects.

Upon such motion it is debatable whether letters alleged to have been written by the corespondent to defendant and received by her and claimed to have been thereafter delivered to plaintiff, should be received upon the plaintiff's affidavit unaccompanied by other affidavits, and when defendant objects, such letters will not be considered by the court.

MOTION for permission to serve an amended answer and for alimony and counsel fee.

Cornelius J. Sullivan (Delancey Nicoll, Outerbridge Horsey, of counsel), for plaintiff.

Cadwalader, Wickersham & Taft (John B. Stanchfield and John F. Brennan, of counsel), for defendant Anne U. Stillman.

John E. Mack, guardian *ad litem* for defendant Guy Stillman.

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MORSCHAUSER, J. This motion is made by the defendant Anne U. Stillman for permission to serve an amended answer and for alimony and counsel fee. The plaintiff consented to the granting of the order for permission to serve an amended answer, but opposed the motion for alimony and counsel fee.

Before deciding the motion, I deem it proper to pass upon the exhibits: Exhibit "A" the alleged letter from defendant to plaintiff, and the Exhibits "B" to "H" inclusive, consisting of letters alleged to have been writen by the corespondent to defendant and received by her and claimed to have been delivered subsequently to the plaintiff. The defendant objects to the use of these exhibits by plaintiff. Section 831 of the Code of Civil Procedure provides as follows:

"§ 831. When husband and wife not competent witnesses; when competent.—A husband or wife is not competent to testify against the other, upon the trial of an action, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, except to prove the marriage or disprove the allegation of adultery. However, if upon such trial or such hearing the party against whom the allegation of adultery is made produces evidence tending to prove any of the defenses thereto mentioned in section 1758 of this act, the other party is competent to testify in disproof of any such defense. A husband or wife shall not be compelled, or without consent of the other, if living, allowed to disclose a confidential communication, made by one to the other during marriage."

Communications and transactions between husband and wife were early recognized as privileged and neither could be compelled to disclose what took place between them and neither was a competent witness to testify as to such transactions or communications of a confidential nature or induced by the marital relation.

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From experience it was found that far less evil would result from the exclusion of such testimony than from its admission. It may in individual cases work hardship, but the destruction of confidence between a husband and wife would cause much misery and affect the marriage relation. This rule is founded upon sound public policy. Those living in the marriage relation should not be compelled or allowed to betray the mutual trust and confidence which such relation implies. When modified by legislative enactment, no wider interpretation has been given than the plain letter of the law demanded and when by statute the disqualification was removed allowing husband and wife to testify as against each other and compelling them to testify, the rule still obtained and did not affect the exclusion of privileged communications between the spouses under the common law rules. It is applicable, though terminated by divorce or by the death of one of the parties.

Letters between husband and wife are within the protection of the rule as are oral communications, and the contents thereof can not be disclosed unless the privilege is waived. *Bowman* v. *Patrick*, 32 Fed. Repr. 368; *Hopkins* v. *Grimshaw*, 165 U. S. 342.

In the *Bowman* case the wife's administrator found among her papers letters from her husband relating to matters in a suit in which he was then interested. The administrator in a spirit of hostility to the husband delivered the letters to the other side, which sought to use them, and the letters were held privileged.

In the *Hopkins* case, Mr. Justice Gray, delivering the opinion of the court, on page 349, said: "At common law, upon grounds of public policy, husband and wife (with some exceptions not here material) were not permitted, even by consent, to give evidence for or against each other, or to testify, even after the end-

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ing of the marriage relation by death or divorce, to private communications which took place between them while it lasted."

In *Millspaugh* v. *Potter*, 62 App. Div. 521, Mr. Justice Smith said at page 524: "There it was sought to prove a confession by the wife to the husband which is clearly within the protection of the statute."

Judge Parker in *Warner* v. *Press Pub. Co.*, 132 N. Y. 181, on page 185 said: "The evidence offered could have no purpose useful to the defendant unless it tended to show that during such a conversation with her husband she said or did, or omitted to say or do something, from which it might be inferred that there existed an unlawful intimacy between her and Smith.

"A conversation on such a subject between husband and wife seems to us to be clearly within the protection of the statute.

"The appellant calls our attention to the decision in *Parkhurst* v. *Berdell* (110 N. Y. 386-393), in which Judge Earl, in speaking for the court, said: 'What are confidential communications within the meaning of the section? Clearly not all communications made between husband and wife when alone. * * * They are such communications as are expressly made confidential, or such as are of confidential nature, or induced by the marital relations.'

"Clearly, the definition given does not exclude such a conversation as the defendant desired to prove from the protection of the statute. Its nature was not only confidential, but it was apparently induced by the marital relation, for it cannot be conceived that such a topic would have been the subject of discussion but for the existence of such relation between the parties.

"A further test by which to determine whether a communication is confidential is suggested by the learned judge in characterizing the nature of the con-

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versations sought to be excluded in that case. He said: 'They were ordinary conversations relating to matters of business which there is no reason to suppose he would have been unwilling to hold in the presence of any person.'

"It can not be supposed that both husband and wife would have been willing to discuss such a subject in the presence of other persons or would have consented to a repetition of the conversation by either party to it. Its nature, and the relation of the parties, forbade the thought of its being told to others, and the law stamped it with that seal of confidence which the parties in such a situation would feel no occasion to exact."

In *Hanor* v. *Housel,* 128 App. Div. 801, said Mr. Justice Sewell on page 803: "It is equally clear that the court did not err in excluding the affidavit of the wife, or that part of the conversation between her and the plaintiff which tended to show that the defendant had had criminal intercourse with her. They were not only confidential, but they were apparently induced by the marital relation and clearly within the prohibition of section 831 of the Code of Civil Procedure, which provides that 'A husband or wife shall not be compelled, or without the consent of the other if living, allowed to disclose a confidential communication made by one to the other during marriage.'"

There are actions not founded on the charge of adultery where the communications were held not to be confidential. In actions for alienation of a wife's affection proof of the ill-treatment of the wife by the husband is competent; profane and abusive language used by him to her is not a confidential communication. *Millspaugh* v. *Potter, supra.*

In *Fowler* v. *Fowler,* 33 N. Y. St. Repr. 746, it was held that declarations made by a husband to his wife the second night after the marriage that he did not

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love her and had made a mistake in marrying her, which was the beginning of a course of ill-treatment, was not a privileged communication.

Norris v. *Lee*, 136 App. Div. 685, was an action on a promissory note made by a husband and wife. A letter was written by the husband to his wife to chronicle his daily doings and stating that he would settle with the plaintiff when he obtained certain moneys. It was held that such letter should not be excluded as confidential communication.

The learned presiding justice of the Appellate Division in this department, Mr. Justice Jenks, said on page 686: "The letter is an ordinary epistle wherein the husband writes to his wife to chronicle the weather, his daily doings, his efforts to find a summer place for the family, and such petty matters. It contains a single sentence which might be pertinent.—'I will settle with your mother just as soon as I can get my hands on the money from the mortgage which I hope to do next week.' I think that this was not a confidential communication within the inhibition of the Code of Civil Procedure (§ 831)."

It is a debatable question whether Exhibits "B" to "H" should be received upon plaintiff's affidavit unaccompanied by other affidavits. Matters plaintiff cannot testify to on the trial or hearing on the merits of a special proceeding under section 831 of the Code of Civil Procedure he should not be permitted to place in an affidavit on a motion of this kind when the defendant objects. He cannot testify to the handwriting of the defendant or of the corespondent in actions of this kind. The husband or wife in actions for divorce founded on adultery is permitted to testify to the marriage or disprove the allegations of adultery. And section 831 of the Code did not limit the testimony to a denial simply but gave the right generally "to dis-

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prove the allegation of adultery," to show that the allegation was not true, and that the defendant could not only deny, but could testify to, any fact or circumstances, within defendant's knowledge, competent and material on the question as to whether the act as charged was committed.

In *Biers* v. *Biers*, 156 App. Div. 409, at page 411, the learned justice (McLennan, P. J.) said: "This section has been held to mean that the alleged guilty party is not limited to denying specifically the charges of adultery, but may testify to any fact or circumstance within his or her knowledge, competent and material on the question as to whether the act, as charged, was committed. (*Huntley* v. *Huntley*, 73 Hun, 261; *Stevens* v. *Stevens*, 54 id. 490; *O'Hara* v. *O'Hara*, 136 App. Div. 378.) The effect of these decisions is that in order to 'disprove the allegation of adultery' the party charged may testify to facts tending to deny the charges made, or to prove that they were procured to be committed or connived at by the other party to the marriage, or that the offenses have been forgiven and condoned."

And at page 413 the learned justice said: "It is urged by the respondent that the provisions of section 831 are intended only to prohibit the husband or wife from testifying against the other upon the issue of adultery in an action for absolute divorce, and that if other issues are tendered by the defendant, such as connivance, or condonation, either party may testify without restraint upon such issues. We are unable to agree with this contention. It is contrary to the plain reading of the statute, and the language of the section has been strictly applied by the courts in all cases, so far as we have been able to find. In *Valentine* v. *Valentine* (87 App. Div. 156) it was held error to allow the wife to testify against her husband concerning his

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property and income. In *Dickinson* v. *Dickinson* (63 Hun, 516) it was held error to permit the plaintiff to testify to the fact of her residence where jurisdictional facts were in issue. (See, also, *Finn* v. *Finn*, 12 Hun, 339; *Taylor* v. *Taylor*, 123 App. Div. 220; *Colwell* v. *Colwell*, 14 id. 80; *Budd* v. *Budd*, 55 id. 113.)"

While the party charged could testify to facts tending to deny the charges made, or to prove that they were procured to be committed or condoned at by the other party to the marriage, or that the offenses have been forgiven or condoned, the plaintiff by his testimony could not disprove it. The decision in the *Biers* case was overcome by an amendment to section 831 of the Code by chapter 181, Laws of 1915, as follows: "However, if upon such trial or such hearing the party against whom the allegation of adultery is made produces evidence tending to prove any of the defenses thereto mentioned in section seventeen hundred and fifty-eight of this act, the other party is competent to testify in disproof of any such defense."

Mr. Nichols in his work on New York Practice (Vol. 1, p. 547), said: "The question as to whether a person incompetent to testify as a witness can make an affidavit which will be considered, and the effect thereof, is of considerable interest, but no positive rule has been laid down in regard thereto in this state. It has been held that where the testimony of the plaintiff would be incompetent, by reason of its relating to a transaction with a deceased person, the plaintiff's affidavit is not alone sufficient to support an injunction and the appointment of a receiver, and that a person serving a sentence on a conviction for a felony, can not make an affidavit. * * *." Referring to *Gregory* v. *Gregory*, 33 N. Y. Super. Ct. (1 J. & S.) 1; *People ex rel. Lord* v. *Robertson*, 26 How. Pr. 90. See,

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also, *Capes* v. *Capes*, 173 App. Div. 142; *Colwell* v. *Colwell*, 14 id. 80.

In the case of *People ex rel. Lord* v. *Robertson*, *supra*, an insolvent debtor was disqualified from making an affidavit to his petition for his discharge from imprisonment under the insolvent laws and Mr. Justice Lott said at pages 91 and 92: "The disqualification is general. It extends to all cases where the declaration of the party is to be used in a judicial proceeding for the purpose of establishing or proving some fact; and it applies both to written and oral evidence. It is not limited to testimony or evidence on the trial of causes between parties, but in terms applies to all matters civil or criminal. The provision is intended as a rule of evidence, and as protection to the community against the peril of testimony from a person guilty of an offence implying such dereliction of moral principle as in the opinion of the legislature to carry with it the presumption of a total disregard to the obligations of an oath.

"Insolvent proceedings are very important in their consequences, extending, in some cases, to the absolute discharge of debts, and in others limiting parties in the remedies for their collection, and affidavits of the applicant are required, of more or less stringency, to guard against fraud, and for the protection of the rights of creditors to be affected by them.

"There is, therefore, as much if not more reason for disqualifying a person convicted of a felony from making such an affidavit, as there is to disqualify him from being a witness on trial of a cause between third persons.

"The effect and extent of the disability created by the statute of a similar character in England was discussed and considered *In re Sawyer* (2 Adol. & Ellis, N. S. p. 721), and it was held to extend to an

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affidavit which had been used to show cause against a rule calling upon another party to answer certain matters, and the court ordered the affidavit to be taken off the files. (See also 1 Greenleaf on Evidence, sec. 374.)"

The affidavit must be made by a person having personal knowledge of the facts and who is legally competent to testify under oath. 2 Cyc. 5.

There are numerous methods by which these exhibits "B" to "H" may be made competent and proved, but not by the testimony of the plaintiff or by his affidavit, where objection is made thereto.

The exhibits should not be considered by me upon this motion. There are many statements in the respective affidavits of plaintiff and defendant that I believe are not competent in a case of this kind. I did not consider them on this motion when I believed they violated the rule.

The plaintiff presents with his affidavit the testimony taken at the hearings before the learned referee as to the acts and conduct of the defendant. She denies these acts and conduct in her affidavit. The trial is pending and she has not been examined. The defendant has amended her answer and charges acts and conduct upon the plaintiff of similar character as charged by him against her and such acts are supported by affidavits of different persons. She does not seek a divorce but pleads recrimination against the defendant as a defense. If the acts and conduct as charged against each other are sustained, neither will be entitled to a decree.

"Sec. 1758. When divorce denied, although adultery proved. In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established: * * * (Subdivision 4) Where the plaintiff has also been guilty of adultery, under

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such circumstances, that the defendant would have been entitled, if innocent, to a divorce."

If these charges are established the plaintiff and defendant will find themselves in the same position as before the commencement of the action, except that they will have had their day in court, or perhaps several days, as to matters affecting them, and this all means time, labor and the expenditure of money. The children must be maintained and the defendant must be maintained and supported in a manner corresponding to her rank and position and the fortune of her husband. We must look to all the circumstances of the particular case, in order to award what is fair and just between the parties, for no two cases are alike. The charges against the defendant are very serious and momentous and, if sustained, the consequences would be very serious to her future, even if she should succeed in sustaining the charges against the plaintiff. This case is of great importance to her. It is her right to make a vigorous effort to meet the proof that may be presented against her and to present her defense, not only for herself, but for the interests of her children. Aside from these considerations, there is one person in this case who is so young and innocent as not to understand what this action is all about and will not understand until he comes to an age of understanding. If plaintiff is successful against the child, the child will bear a stain that cannot be erased and for which he is not responsible. The plaintiff seeks to do that which he believes is his duty to himself and his children. The plaintiff having challenged the paternity of the child, the defendant comes to its protection and to the defense of its legitimacy. This is her duty if she is right in her claim. She vigorously champions the child's cause and this is expected from any mother.

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Our law in its wisdom provides for the care and protection of those who cannot protect themselves, especially infants and those of tender years. There is such an infant in this case. The infant is made a defendant and its paternity is questioned. The courts are charged with the duty of protecting it. In this case the infant is represented by an honored and eminent member of the bar, who will protect the infant's interests and give the best that is in him, bringing into play all the learning and ability that the law expects from one placed in such a position of trust. The interests of the defendant and of the infant in this case are to a great extent the same. The contest means much and no mistake should be made. It should not be permitted to be made. Litigation is expensive and troublesome; and such litigation as is anticipated in this case means the bringing of many witnesses from many places and a long and protracted trial. It should not be said that all were not heard that should have been heard. All this means money and time, labor and effort. Proper provision must be made to meet the conditions presented. I believe the counsel fee should be allowed in the sum of $35,000, and $12,500 be allowed for expenses. During the pendency of the action the defendant and the children, and this includes the infant herein attacked, must be provided for. The children, except the infant herein, are of sufficient age to determine with whom they desire to reside during the pendency of the action. Their preference should control in the circumstances as now presented. While the children are with the mother or in her charge, she must provide for their schooling and other necessary expenses. I believe to meet the conditions, the alimony should be allowed in the sum of $7,500 per month.

Order may be presented in accordance herewith

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and when signed the stay vacated and the trial proceed before the learned referee at a time and place to be agreed upon between the parties, and if the parties cannot agree, the learned referee may fix the time and place.

Ordered accordingly.

Matter of the Estate of HERMAN APPEL, Deceased.

(Surrogate's Court, New York County, April, 1921.)

Discovery — when cannot be used in Surrogate's Court to collect a debt — when order to attend inquiry will not be granted.

A discovery proceeding cannot be used in the Surrogate's Court to collect a debt, and where it is apparent that delivery of specific property cannot be directed, an order to attend the inquiry will not be granted.

APPLICATION for an order of discovery.

Kornblueh & Hunter, for petitioner.

COHALAN, S. This is an application for an order in a discovery proceeding. It plainly appears from the petition that the petitioner is not entitled to the order, because a discovery proceeding in the Surrogate's Court cannot be used for the purpose of collecting a debt. Where it appears on the face of the petition that delivery cannot be directed, an order to attend an inquiry should not be granted. This precise question was presented and decided in *Estate of Denham*, N. Y. L. J., June 23, 1917, where this court said:

"The petitioners in the discovery proceeding admit in the brief filed in their behalf that 'the object of this inquiry is to obtain information concerning property, (a chose in action) which should be * * * included

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in the inventory and appraisal.' It has been repeatedly held and is still the law that a discovery proceeding is designed 'for the purpose of discovering specific property or specific money in coin and bank bills belonging to the deceased and withheld, on which discovery they may be ordered delivered summarily, but the provisions do not contemplate the collection of a debt by summary process.' (*Matter of White,* 119 App. Div. 140.) Where it is admitted that the object of the proceeding is to secure information about property which is incapable of delivery, an examination is unnecessary and the proceeding should end. A discovery proceeding in this court cannot be used for the purpose of ascertaining the discovering evidence to be used in another action or proceeding. Motion to vacate order granted." Upon appeal this disposition was affirmed. *Matter of Denham,* 180 App. Div. 935. See, also, *Estate of Soule,* N. Y. L. J., March 15, 1921.

The application must, therefore, be denied.

Application denied.

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PEOPLE OF THE STATE OF NEW YORK ex rel. HARRY B. WEATHERWAX, Petitioner, v. JAMES R. WATT, as Mayor of the City of Albany, Defendant.

(Supreme Court, Albany Special Term, April, 1921.)

Mandamus — when writ will issue upon the application of a private citizen requiring the mayor of a city to enforce section 26 of the Transportation Corporations Law — Transportation Corporations Law, § 26 — Second Class Cities Law, § 54 — Public Service Commissions Law, §§ 48, 57 — Penal Law, § 29.

Where a clear legal right exists and there is no other adequate remedy, a writ of mandamus may issue in the discretion of the court. (P. 148.)

A mandamus proceeding to enforce a right in which the general public is interested, to wit, that the streets of a city shall remain unobstructed and unencumbered, may be maintained by a citizen and resident of the city. (Pp. 127–134.)

Where it is made to appear that in the city of Albany, for at least six weeks, more than 500 motor vehicle lines of the character described in section 26 of the Transportation Corporations Law, which in the interest of the public welfare prohibits bus lines or any vehicles carrying passengers at a rate of fare of fifteen cents or less for each passenger within the limits of the city, have been and are now being unmolestingly operated upon the public streets of the city without the consent of the local authorities and without a certificate of public necessity and convenience from the public service commission, as required by said section of the Transportation Corporations Law, and it further appears the mayor of the city, one of whose duties under section 54 of the Second Class Cities Law is to see that the laws of the state are executed, has openly and publicly announced his positive refusal to perform such duty, a writ of mandamus, upon the application of a citizen of the state who is also a resident of the city, will be granted requiring the said mayor to direct the commissioner of public safety, who is neither a proper nor necessary party to the present proceeding, to enforce by action of the police department of the city, the provisions of section 26 of the Transportation Corporations Law. (Pp. 121–123, 150–151, 155.)

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In such case, neither a direction of the public service commission to its counsel to proceed under section 48 or section 57 of the Public Service Commissions Law, which means that each individual operating a jitney unlawfully must be proceeded against separately, or to conduct a summary proceeding in the Supreme Court to have the unlawful act enjoined, can, in the extraordinary situation presented here, be deemed an adequate remedy. (Pp. 148–150.)

Violations of the provisions of section 26 of the Transportation Corporations Law are punishable as misdemeanors under section 29 of the Penal Law. (P. 139.)

APPLICATION for peremptory writ of mandamus.

Sanford & Alexander (Rollin B. Sanford, of counsel), for petitioner.

John J. McManus, Corporation Counsel, for respondent.

HINMAN, J. This is an application for a peremptory writ of mandamus. The relator, Harry B. Weatherwax, makes the application as a citizen of the state and a resident of the city of Albany. The petition asks for a writ of mandamus directed to James R. Watt, as mayor of the city of Albany, requiring him to enforce within the city of Albany those provisions of section 26 of the Transportation Corporations Law which prohibit bus lines or any vehicles carrying passengers at a rate of fare of fifteen cents or less for each passenger within the limits of the city from operating along the streets of the city without procuring the consent of the local authorities and of the public service commission.

It appears, without dispute, that Albany is a city of the second class; that by section 54 of the Second Class Cities Law it is expressly made the duty of the mayor to see that the city officers and departments

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faithfully perform their duties, to maintain peace and good order within the city and to take care that the laws of the state are executed and enforced within the city; that for at least six weeks more than 500 motor vehicle lines of the character described in section 26 of the Transportation Corporations Law have been and now are being operated upon the public streets of Albany without the consent of the local authorities and without a certificate of public necessity and convenience from the public service commission; that all of said motor vehicle lines have so operated and are continuing to so operate without being in any manner prevented or restrained by the said mayor or by the city officers, or departments under him; that the said violations of law are and have been during the whole period open, notorious and general throughout the city; that the persons operating said vehicles have during all said times and now continue to openly and publicly call out their routes and the fares and solicit passengers, and display signs on their vehicles indicating the route, the rate of fare and destination of the route, all in the most public places of the city and the most frequented streets and in the presence and hearing of the members of the police department of the city; that the acts of said persons and the operation of said motor vehicle lines are so open and notorious and have been so long continued that the said mayor is chargeable with knowledge thereof; that in fact on several different dates from March 25 to April 5, 1921, the relator notified the said mayor that hundreds of said auto lines were being operated unlawfully in the city of Albany and requested the said mayor to enforce the law; but that on the 5th of April, 1921, the said mayor informed the relator and announced to the public of said city that he refused to stop the operation of said motor

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vehicle lines and gave as his reason the advice of the corporation counsel of said city that such acts of the persons so operating did not constitute a crime punishable as a misdemeanor.

Supporting affidavits, also uncontradicted, reveal about fifty concrete illustrations of violators, giving the name of owner, license number, type of vehicle and signs displayed showing route and fare. The affiants swear to having taken repeated trips upon them as passengers, paying the fare prescribed and travelling over the routes described by their respective signs.

The answer of the said mayor raises no issue as to any of the foregoing facts. It is conceded upon the papers before me that the provisions of section 26 of the Transportation Corporations Law are being and have been for a long period violated in a wholesale, open and notorious manner, so glaringly a matter of common knowledge that the court might even take judicial notice of the fact.

In fact the answer of the said mayor is wholly a plea in the nature of a confession and avoidance. He says that the relator is vice-president of the United Traction Company, which operates a street railway in the city of Albany and elsewhere; that said traction company has not been granted an exclusive franchise to transport passengers for hire upon the streets of Albany; that because of a strike of its employees, said traction company ceased operations on all of its lines in said city on January twenty-ninth last and did not attempt to resume operations until an order was made by the public service commission, effective February 8, 1921, requiring it to resume operations and to furnish safe and adequate service; that no service at all has been furnished by said traction company from January 29, 1921, to date on its Second avenue and Livingston avenue lines and that adequate

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service for the entire traveling public has not been furnished upon its other lines and is not now being furnished by it; that the number of cars now being operated in the city is about thirty-five as against about eighty cars usually operated in the city prior to the strike; that the enforcement of section 26 of the Transportation Corporations Law is in the first instance wholly within the jurisdiction of the public service commission; that such commission has general supervision of all common carriers and has sole jurisdiction to determine in the first instance whether the operation of said motor vehicle lines is a violation of said section 26; that he is informed by his corporation counsel that a violation of said section 26 is not made a crime by any statute but on the contrary every owner or operator of such a motor vehicle line is expressly made subject to the provisions of the Public Service Commissions Law; that the Public Service Commissions Law and the Transportation Corporations Law are *in pari materia* and that sections 25 and 26 of the Transportation Corporations Law are to be considered as incorporated in the Public Service Commissions Law and are a part thereof; that by section 56 of the Public Service Commissions Law, any common carrier violating section 26 of the Transportation Corporations Law shall forfeit to the people of the state not to exceed $5,000 for each offense; that there is no provision in either of said statutes providing that any such common carrier shall be guilty of a crime for any violation of either of said statutes; that the duty of owners of such motor vehicle lines to obtain such local consent and certificate was a new duty imposed by the Laws of 1915 and not required prior to that time and that in such a case, if a penalty and mode of procedure be given by the

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same statute for its violation, the remedy given is exclusive.

The said mayor thus denies that a crime is being committed by violation of section 26 of the Transportation Corporations Law; denies that he has any right to stop the operation of the said motor bus lines by reason of his having no jurisdiction to enforce within the city of Albany the observance of any of the provisions of said section 26, and alleges upon information and belief that any person including the members of the police force who might cause or instigate the arrest of any of the persons mentioned in the petition for an alleged violation of said section 26 would be liable in damages in a suit for false imprisonment or malicious prosecution, in the event that it should thereafter be determined that any violation of said section does not constitute a crime.

He further contends that by the Second Class Cities Law the commissioner of public safety has supervision and control of the police department of the city and that said commissioner of public safety is a necessary party defendant.

He further objects to being required to enforce this statute upon the ground that the petitioner and each and every citizen has an adequate remedy at law, if misdemeanors are being committed, in that the petitioner or any citizen may lay any information before a magistrate and procure a warrant for the arrest of any violator.

And finally, the said mayor alleges upon information and belief, that the said traction company is not affording reasonable, just and adequate transportation upon its lines within the city and that an emergency has been created in which others must engage in the transportation of passengers so that business within the city shall not be entirely blocked or dis-

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couraged; that as mayor of said city he has been and is in good faith exercising his judgment and discretion in the premises and believes it would be an injustice upon the public if any steps were taken which would deprive them of adequate transportation; that the whole question of adequate, just and reasonable transportation service in the city should be decided by the public service commission.

The learned corporation counsel in an argument and brief showing industry, research and ability, strenuously asserts that these are valid objections to the writ herein sought. Some of the principles formulated by him find support in the authorities, but fall very far short of sustaining his contention that the relator is not entitled to the relief sought.

In his brief he urges a still further objection that the special interest of the relator is not set out in the petition and that for this reason alone his petition should be dismissed. His contention is that the relator having proceeded to argument upon his petition and the opposing affidavits of the respondent, the proceeding is in the nature of a demurrer to the facts set up by the defendant and the right to the writ must be determined upon the assumption that the averments of the defendant's affidavits are true. Citing *People ex rel. City of Buffalo* v. *New York Central & Hudson R. R. R. Co.*, 156 N. Y. 570.

He claims that it appears from the answering affidavits that the relator is seeking to enforce the private interests of the United Traction Company, and that in such a case the special interest of the United Traction Company must be set out in the petition and its private right to relief must be made clearly to appear. Citing *People ex rel. Pumpyansky* v. *Keating*, 62 App. Div. 348, reversed on other grounds, 168 N. Y. 390.

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His citation of this authority is an unfortunate one for his contention, as I shall endeavor to show. Both the Appellate Division and the Court of Appeals sustain the proposition that an application for a peremptory writ of mandamus commanding the commissioner of highways of the city of New York to remove a stand for the sale of newspapers and periodicals upon a street of the city, is a proceeding to enforce a right in which the general public is interested and may be maintained by a citizen and resident of the city; that it was a right in which the general public is interested, to wit, that the streets of the city shall remain unobstructed and unencumbered. The case was reversed by the Court of Appeals in order that a new trial might determine to what extent, if any, there was an encroachment upon the traveled portion of the sidewalk. In the opinion of the Appellate Division on this point, which was expressly approved by the Court of Appeals, the court referred to the rule that where the relator seeks to enforce a private right, his special interest must be set out in the petition and his right to relief must be made clearly to appear, but the court said that this rule was not applicable in that case, saying at page 350: "It is plain that the relator has standing to maintain this proceeding. The right which the writ seeks to enforce affects the general public, and, under such circumstances, the enforcement of the right, is the concern of every citizen, and no special interest, except that of the general public, need be shown."

The contention of the corporation counsel is based upon a theory which is untenable. His theory is that the enforcement of section 26 of the Transportation Corporations Law deals only with the question of a vehicle carrying passengers in competition with another common carrier which is required by law to

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obtain the consent of the local authorities of the city to operate over the streets thereof. The fact is, however, that no question of competition with such a common carrier is necessary to be determined in connection with this decision.

In my decision recently rendered in the case of *United Traction Co.* v. *Smith,* 115 Misc. Rep. 73, I called attention to the authorities as to the variety of cases covered by said section 26. For example, I called attention to the carefully prepared opinion of Mr. Justice Brown in *Public Service Commission* v. *Hurtgan,* 91 Misc. Rep. 432, in which, at page 435, he graphically outlines the cases in which a license must be obtained.

Mr. Justice Brown states that the statute requires such consent for the operation in a city of either

"(a) A bus line,

"(b) A stage route,

"(c) A motor vehicle line or route,

"(d) A vehicle in connection with a bus line, a stage route, a motor vehicle line or route,

"(e) A vehicle carrying passengers at a rate of fare of fifteen cents or less within the limits of a city.

"(f) A vehicle carrying passengers in competition with another common carrier which is required by law to obtain the consent of the local authorities of said city to operate over the streets thereof.

" The statute is that to lawfully operate any one of the above six specified lines, routes or vehicles, in a city, the consent of the local authorities and a certificate of the Public Service Commission must be first obtained, provided such line, route or vehicles, are engaged in the business of carrying passengers for hire in the city."

The petition herein in paragraph 4 makes no reference to vehicles carrying passengers in competition

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with another common carrier, but refers to the unlawful operation of motor vehicles as bus lines, stage routes and motor vehicle lines carrying passengers for hire at a rate of fifteen cents or less for each passenger. The mere fact that one of the incidental effects of the operation of these vehicles is to compete with another common carrier of which the relator is the vice-president is beside the question, if the relator is seeking to enforce a right in which the general public is interested, which is clearly the case here.

In order that we may clearly see that this proceeding is not one sounding in the private interest of the United Traction Company of which the relator is the vice-president, but in the interest of the general public, it may be very beneficial to consider the history and terms of section 26 of the Transportation Corporations Law, in order that we may understand the purpose which the legislature sought to serve.

Prior to 1913 there was no express provision in the statutes with reference to bus lines being deemed to be included within the meaning of the term "common carrier" as used in the Public Service Commissions Law, except under section 24 of the Transportation Corporations Law, which related to any person or corporation owning or operating any stage route in any city of 1,000,000 inhabitants or more, namely, the city of New York.

By chapter 495 of the Laws of 1913, section 25 was added to the Transportation Corporations Law. Section 25 enlarged the jurisdiction of the public service commission by prescribing that any person or corporation owning or operating a bus line wholly or partly along a highway constructed wholly or partly at the expense of the state, or along any highway in any city of the first class other than New York city, should be deemed a common carrier within the meaning of

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that term as used in the Public Service Commissions Law.

Then by chapter 667 of the Laws of 1915, section 25 was amended and section 26 was added to the Transportation Corporations Law. By this amendment and addition to that statute, the jurisdiction of the public service commission was further extended to any bus line or motor vehicle line or any vehicle carrying passengers at fifteen cents or less each within the limits of any city or in competition with another common carrier which is required by law to obtain the consent of the local authorities of the city to operate over the streets thereof.

But this addition to the statute went beyond the proposition of making such common carrier subject to the jurisdiction of the public service commission and required such bus line or other vehicle line above described, to obtain the consent of the local authorities of said city, "upon such terms and conditions as said local authorities may prescribe." The operation of any such bus line or motor vehicle line or motor vehicle above described was prohibited without first obtaining the consent of the local authorities and without obtaining in addition thereto a certificate of public necessity and convenience from the public service commission. It was not necessary to provide in section 26 for such certificate of necessity and convenience, because that was not only provided for in section 25 of the Transportation Corporations Law, but was provided for in section 53 of the Public Service Commissions Law, under which a common carrier was prohibited from exercising any franchise or right under any provision of any law without first having obtained the permission and approval of the public service commission to the effect that the exercise of such franchise or privilege is necessary or convenient

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for the public service. Presumably for the sake of harmony of the statutes, however, and out of an abundance of caution, section 26 provided for a prohibition against operating any such bus line, etc., until the receipt of a certificate of public necessity and convenience.

It is plain that section 26 of the Transportation Corporations Law was enacted by the legislature for the purpose of conferring upon the local authorities of any city the right and the duty to regulate and prescribe the terms under which such bus lines, etc., should be operated over the streets of such city, and to afford the protection of the city's property, its pavements, improvements and bridges, together with the protection of the passengers of such bus lines and all other persons using such streets, which such regulation and control would provide.

In other words it was a general provision in the interest of the public welfare, in the upkeep of the streets and in the protection of the passengers and in the protection of other users of the streets by vehicle or as pedestrians, that section 26 was passed. Incidentally, of course, the regulation of these bus lines tended to and does result in the protection of the investment of those who were operating railway lines under a legal franchise from unjust and improper competition, because of the financial loss resulting and the destruction of the service guaranteed to the public through the supervision of such existing railway lines by the public service commission. The intent was that all common carriers should be subject to the same supervision by the public service commission, but so far as the protection of an existing common carrier from improper competition was concerned, that matter was left entirely to the

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public service commission and not to the local authorities.

Thus I would say that the duty which was delegated to the city was a duty in the public interests rather than a duty relating to the question of competition with another common carrier. The fact is that if there were no railway lines in the city of Albany or if a new section of the city were being built up and which was not convenienced by any existing transportation lines, it would nevertheless be the duty of the city to require any bus line to obtain the consent of the city upon such terms and conditions that the city might prescribe before such bus line could operate lawfully. It is not a question of competition so far as section 26 is concerned; it is a question of the protection of the public interests and section 26 sets forth some of the terms and conditions which may be included by the city as pre-requisites to the granting of the franchise, namely,

(A) Description of route.

(B) Rate of speed.

(C) Compensation for wear and tear of pavement, improvements and bridges.

(D) Safeguarding passengers and other persons using the streets over which such vehicles are to operate.

(E) The execution and delivery of a bond to provide adequate security for the performance of the terms and conditions of such consent, including adequate security for the payment of any damages occurring to any person on account of the operation of such bus line or route, such as passengers and other persons using the streets.

Each one of these terms and conditions for the local consent prescribed by the city, speaks in terms of public protection and not in the interest of any com-

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peting carrier. Thus I would say that section 26 was put in the statute, not for the purpose of giving to the public service commission any jurisdiction, but to provide for local consent upon such terms as would protect the local public and the local property.

A strike of the employees of a local railway company has led to the operation of the so-called "jitneys" upon the streets of the city of Albany, but the provisions of section 26 have no relation whatsoever to the question whether or not adequate railway service is being rendered by such traction company, or whether a strike is in existence as to the justice of which public opinion is divided. It is solely a question of the performance of public duty in the carrying out of a statute designed entirely to protect the city streets and the users of the city streets. A legal method for such protection has been devised by this statute and if an emergency of any kind exists, it can be met in the same legal way.

The fact that these bus lines are made common carriers and thus subject to the public service commission, is a thing separate and distinct from the fact that the local authorities have had conferred upon them by statute a power and a duty, not conferred upon the public service commission, to prescribe the terms and conditions which will protect the city's property and all persons using the streets of such city, to prescribe regulations which will tend to prevent injury so far as possible and indemnify against such damage as may result notwithstanding such regulations.

So it is plain that the relator has standing to maintain this proceeding. "The right which the writ seeks to enforce affects the general public, and, under such circumstances, the enforcement of the right is

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the concern of every citizen, and no special interest, except that of the general public, need be shown."

The basic reason urged by the corporation counsel for withholding the relief asked for by the relator is that the acts alleged in the petition do not constitute crime under the laws of the state of New York. I have already expressed the opinion that the operation of such unauthorized jitneys is contrary to statute and that it is punishable under section 29 of the Penal Law. I think my declaration to that effect was not obiter, but was warranted by the record before me and by the arguments made and by facts of such quantity and notoriety that the court might well take judicial notice of them. *United Traction Co.* v. *Smith,* 115 Misc. Rep. 73. However that may be, the corporation counsel has considered my holding in that case as not necessary to my decision and has since advised the mayor in a written opinion that the offense is not punishable as a crime, courteously holding that I did not have the benefit of a full discussion of the question by counsel.

There is no provision in the Transportation Corporations Law imposing any penalty for a violation of section 26 of that statute. The Penal Law provides, however, in section 29 thereof as follows:

"§ 29. Violation of statute which imposes no penalty is a misdemeanor. Where the performance of any act is prohibited by a statute, and no penalty for the violation of such statute is imposed in any statute, the doing such act is a misdemeanor."

Section 1937 of the Penal Law provides as follows:

"§ 1937. Punishment of misdemeanors when not fixed by statute. A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this chapter, or by any other statutory provision in force at the time

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of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

It is plain that no penalty for the violation of section 26 of the Transportation Corporations Law has been imposed under that law. The corporation counsel contends, however, that a penalty has been prescribed for such violation by section 56, subdivision 1, of the Public Service Commissions Law, upon the theory that the Public Service Commissions Law and the Transportation Corporations Law are *in pari materia*, that is, statutes which must be read together.

Section 56, subdivision 1, of the Public Service Commissions Law provides that: "Any common carrier, * * * which shall violate any provision of this chapter, or which fails, omits or neglects to obey * * * any order * * * of the commission, shall forfeit to the people of the state of New York, not to exceed the sum of five thousand dollars for each and every offense * * *."

It is to be noted that section 56, subdivision 1, of the Public Service Commissions Law imposes a penalty for a violation of any provision of the *Public Service Commissions Law* or of an order of the commission.

A penalty for the violation of any provision of the Public Service Commissions Law is clearly not a penalty prescribed for a violation of the Transportation Corporations Law or of any law, other than the Public Service Commissions Law.

Perhaps the corporation counsel has been misled by the thought expressed by him in the answer of the respondent to the effect that in the construction of the two statutes in question, sections 25 and 26 of the Transportation Corporations Law are to be con-

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sidered as incorporated in the Public Service Commissions Law and are a part thereof; that any common carrier violating section 26 of the Transportation Corporations Law shall be deemed to have violated the Public Service Commissions Law and shall be liable to the penalty prescribed therefor by section 56 of the latter law. It is the rule of construction of statutes *in pari materia* that they should be harmonized, read together and so far as consistent with each other, should be construed as if they had originally constituted one enactment; but he is in error in gleaning the thought from such rule that sections 25 and 26 of the Transportation Corporations Law are to be considered as incorporated in the Public Service Commissions Law so as to render a penalty provision of the latter law for any violation of "any provision of this chapter" (Pub. Serv. Comm. Law) applicable to a violation of said section 26 of the Transportation Corporations Law. The fact is that section 25 of the latter law makes the Public Service Commissions Law, so far as it relates to common carriers, applicable to itself. The Public Service Commissions Law is deemed a part of sections 25 and 26 of the Transportation Corporations Law and so far as the former contains provisions relating expressly to sections 25 and 26 of the latter law or to violations of "any law" or has provisions applicable to "any common carrier," such provisions are deemed to be a part of said sections 25 and 26.

It is only the relevant provisions of the Public Service Commissions Law that are applicable. If a penalty is prescribed in a particular article of a statute for any violation of any provision of such article, would anyone contend that such penalty covered a violation of the provisions of any other article of that statute? Yet both articles are parts of the same

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enactment. The conclusion reached by the corporation counsel is equally untenable when he urges that a penalty for an offense against the Public Service Commissions Law may be deemed a penalty for an offense against section 26 of the Transportation Corporations Law. The two statutes may be interpreted together as parts of one whole enactment, but the Public Service Commissions Law must be considered as though a separate article thereof and sections 25 and 26 of the Transportation Corporations Law as though sections of another separate and distinct article.

A penalty clause in a statute should be construed in accordance with its plain terms and not enlarged by implication, and the plain terms of section 56, subdivision 1, relate only to a violation of the Public Service Commissions Law. If it had been the intention of the legislature to apply such penalty to a violation of the Transportation Corporations Law or any law relating to common carriers, other than the Public Service Commissions Law, the legislature would have adopted the scheme of the Public Service Commissions Law generally where such a purpose was intended as for example, the language used in section 48 of the Public Service Commissions Law, which gives to the commission the power and the duty to investigate any violation of "any provision of law" by a common carrier and to make an order in relation thereto; or as in section 57 for example, where provision is made for a summary proceeding in the Supreme Court at the instance of the commission and its name, for the purpose of stopping and preventing a common carrier from doing anything "in violation of law." Other instances could be set forth which are of similar import as for example, the pro-

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vision of section 74 of the Public Service Commissions Law.

In other words, section 56, subdivision 1, of the Public Service Commissions Law by its plain terms relates to a violation by a common carrier of any provision of the Public Service Commissions Law, and not to "any violation of law" by a common carrier.

If it is contended that a penalty for the violation of section 26 of the Transportation Corporations Law has been imposed through the medium of a proceeding instituted by or before the public service commission and subjecting a common carrier to an order of the commission requiring it to obey "any provision of law," including section 26 of the Transportation Corporations Law, the answer to that contention is that the penalty imposed through such a proceeding is a penalty for the violation of an order of the commission and is not a penalty for the violation of the Transportation Corporations Law. In other words, there is no penalty prescribed in the Public Service Commissions Law for violations of section 26 of the Transportation Corporations Law and for which violations the commission is empowered to hold a hearing and impose the penalty. There may be a thousand violations of section 26 of the Transportation Corporations Law, and a thousand hearings to determine that there were a thousand violations and there may be a thousand orders to discontinue the thousand violations, and yet, there is no penalty prescribed in the Public Service Commissions Law or elsewhere for such past violations of the Transportation Corporations Law. There is no penalty whatsoever prescribed until and unless there is a disobedience of the order or orders of the commission after such hearing and determination. Surely such penalties for the violations of the orders of the com-

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mission cannot be deemed to be penalties for the violation of the Transportation Corporations Law. No penalty is prescribed for the past offense. The penalty is for the continuance of the offense after the order of the commission.

Therefore section 29 of the Penal Law is applicable. It is plainly the law that violations of section 26 of the Transportation Corporations Law are punishable as misdemeanors under section 29 of the Penal Law, and that the penalty of $5,000 for each offense is administered only in cases where the offense is continued in spite of an order of the public service commission.

The applicability of section 29 of the Penal Law to such a case as this is abundantly supported by the authorities. *Gardner* v. *People*, 62 N. Y. 299; *Marra* v. *N. Y. C. & H. R. R. R. Co.*, 139 App. Div. 707; *Keller* v. *Erie R. R. Co.*, 183 N. Y. 67; *Matter of Vanderhoff*, 15 Misc. Rep. 434; *Matter of Pickett*, 55 How. Pr. 491; *People* v. *Olcese*, 41 Misc. Rep. 102.

Another error, however, in the contention of the corporation counsel lies in the fact that he has not properly analyzed all the provisions of the Public Service Commissions Law in his effort to apply the penalty provisions of that law to violations of the Transportation Corporations Law. Thus if we assume for the sake of argument that the penalty provisions of the former are applicable, we find that the offense in question has been expressly made a misdemeanor.

To be more specific, if the violation of "any provision of this chapter" wherever found in the Public Service Commissions Law, relates to a violation of the Transportation Corporations Law, upon the theory of the corporation counsel, then the Public Service Commissions Law has provided, not only a

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penalty of $5,000 for each offense, running against any common carrier who is guilty of such violation, but has provided under section 56, subdivision 2, that violations by every officer and agent of any common carrier are misdemeanors and has provided under section 58, subdivision 2, that violations by *every person,* either *individually or* as officer or agent of a corporation other than a common carrier, are misdemeanors.

Section 56, subdivision 2, of the Public Service Commissions Law provides as follows:

"2. Every officer and agent of any such common carrier or corporation who shall violate, or who procures, aids or abets any violation by any such common carrier or corporation of, any provision of this chapter, or who shall fail to obey, observe and comply with any order of the commission or any provision of an order of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and comply with any such order or provision, shall be guilty of a misdemeanor."

Section 58 of that law provides as follows:

"§ 58. Penalties for other than common carriers. 1. Any corporation, other than a common carrier, railroad corporation or street railroad corporation, which shall violate any provision of this chapter, or shall fail to obey, observe and comply with every order made by the commission under authority of this chapter so long as the same shall be and remain in force, shall forfeit to the people of the state of New York, a sum not exceeding one thousand dollars for each and every offense; every such violation shall be a separate and distinct offense, and the penalty or forfeiture thereof shall be recovered in an action as provided in section twenty-four of this chapter.

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"2. Every person who, either individually or acting as an officer or agent of a corporation other than a common carrier, railroad corporation or street railroad corporation, shall violate any provision of this chapter, or fail to obey, observe or comply with any order made by the commission under this chapter so long as the same shall be or remain in force, or who shall procure, aid or abet any such corporation in its violation of this chapter or in its failure to obey, observe or comply with any such order, shall be guilty of a misdemeanor.

"3. In construing and enforcing the provisions of this chapter relating to forfeitures and penalties the act of any director, officer or other person, acting for or employed by any common carrier, railroad corporation, street railroad corporation or corporation, acting within the scope of his official duties or employment, shall be in every case and be deemed to be the act of such common carrier, railroad corporation, street railroad corporation or corporation."

I have set forth the whole of the latter section for the reason that the corporation counsel argues that it has no application to common carriers and is not applicable here. He relies upon the title of this section and upon the decision of *People* v. *Dempsey*, 180 App. Div. 765. In that case, the court reversed a conviction of an employee of a common carrier but the indictment was based upon a violation of subdivision 2 of section 56. The court's reference to section 58 was only to show the interpretation to be given to section 56, subdivision 2, where the conjunctive "and" is used in the phrase "Every officer and agent," rather than the disjunctive "or" as in section 58, subdivision 2, in the phrase "Every person who, either individually or acting as an officer or agent."

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Clearly the title to section 58 is an imperfect guide to the section because subdivision 3 by its own terms relates to common carriers alone and makes the act of any person acting for or employed by any common carrier, if within the scope of his duties, the act of the common carriers in construing and enforcing the penalty provisions of the Public Service Commissions Law.

Subdivision 2 of section 58 does not expressly relate to gas and electric corporations covered by article 4, nor to steam corporations covered by article 5, nor to telephone and telegraph corporations covered by article 6. While found in a section in article 3, relating to common carriers, it is the dragnet provision of the whole chapter and is intended to cover "every person" by way of criminal liability. Each of the other articles carries its own penalties for violation of such article and section 58, subdivision 2, is an omnibus provision making it a criminal offense to violate any provision of any article and is to be read into every article. It is as general and comprehensive as it can be penned, when a statute refers to "every person."

As was said in *People* v. *Stevens*, 13 Wend. 341: "It is undoubtedly competent for the Legislature to subject any particular offense, both to a penalty and a criminal prosecution; it is not punishing the same offense twice. They are but parts of one punishment; they both constitute the punishment which the law inflicts upon the offense. That they are enforced in different modes of proceeding, and at different times, does not affect the principle."

It is the purpose of the law to punish the intentional doing of the prohibited act. It is not necessary that the act shall be willful in the sense of corrupt or malicious. It is no defense that the act was an

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honest misconstruction of the law under legal advice. A mistake of law does not excuse the commission of the prohibited act. *Gardner* v. *People,* 62 N. Y. 299; *People* v. *Dempsey,* 224 id. 140.

The jitney driver may or may not consider his act unlawful but no jitney driver is conducting his common carrier activities unintentionally or unknowingly, no matter how erratic his behavior may be on the streets of Albany.

Thus the Public Service Commissions Law itself has not made an exclusive remedy through investigation and order of the commission and prescribing a penalty of $5,000 or less for each offense, but has gone to the fullest lengths to make it a misdemeanor for *any* person, whether connected with a common carrier or not, to violate any provision of the Public Service Commissions Law.

Every person has been placed under the restraint of becoming liable as a misdemeanant for personal violation of the statute or of the orders of the commission; and in addition thereto the Public Service Commissions Law has prescribed a more substantial penalty of $5,000 or less, for each offense, to be recovered civilly, where a common carrier has violated the Public Service Commissions Law, or an order of the commission.

Thus, even if we accept the reasoning of the corporation counsel as to the applicability of the provisions of the Public Service Commissions Law, we find that the operation of these bus lines or jitneys in the city of Albany, contrary to the provisions of section 26 of the Transportation Corporations Law, is expressly made a misdemeanor.

To further clarify the situation as to what should be the reasonable interpretation of these statutes in the determination of the question whether or not a

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misdemeanor is committed by the violation of section 26 of the Transportation Corporations Law, one further fact is worthy of notice. Section 53 of the Public Service Commissions Law provides that no common carrier shall "exercise any franchise or right under any provision of the Railroad Law, or of any other law, not heretofore lawfully exercised, without first having obtained the permission and approval of the proper commission." Under section 58 of the Public Service Commissions Law, any violation of the above provision by any person is expressly made a misdemeanor. So that if the operators of the bus lines or jitneys in the city of Albany whose operation is in question here had obtained the consent of the city under section 26 of the Transportation Corporations Law, but had not obtained the certificate of necessity and convenience from the public service commission, such persons would have violated section 53 of the Public Service Commissions Law, and would clearly have been guilty of a misdemeanor under the express provisions of that law. Can it be said that it was the purpose of the legislature to grant a greater immunity from punishment in a case where there is no semblance of right to operate such a bus line or jitney, by reason of a total failure to comply with any of the provisions of any statute, than there would be where there had been a compliance so far as local consent is concerned, but a failure of compliance in relation to obtaining a certificate of public necessity and convenience from the public service commission? Any such assumption would be ridiculous on its face and while the legislature might impose such illogical penalties, no reasonable person would reach such a conclusion in the absence of clear warrant of the statute.

The objection raised in the answer that the enforce-

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ment of said section 26 is in the first instance wholly within the jurisdiction of the public service commission and that such Commission has sole jurisdiction to determine in the first instance whether the operation of such vehicles is a violation of section 26, has been conclusively determined to the contrary in *Brooklyn City R. Co.* v. *Whalen*, 191 App. Div. 737, and other cases to the effect that the question can be determined in injunction proceedings brought by a common carrier, which has a standing in a court of equity for relief.

A number of the other objections raised in the answer can be answered as a group. They relate to the one question, whether crimes are being committed that should receive the attention of the mayor. It is immaterial that the relator is vice-president of the United Traction Company, as I have shown. It is immaterial whether the United Traction Company has an exclusive franchise or not. And if it were material, the courts have held that a corporation with a franchise not exclusive has a remedy to restrain another assuming to exercise similar powers without a franchise. *Brooklyn City R. Co.* v. *Whalen, supra.*

It is immaterial that a new duty has been created by section 26 of the Transportation Corporations Law making an act unlawful which was lawful before the enactment in 1915. While the law is settled that where a new offense is created and a particular penalty and mode of proceeding is prescribed, that penalty alone can be enforced, it is equally clear that both a penalty and a criminal prosecution may be provided as parts of the same punishment. *People* v. *Stevens*, 13 Wend. 341. And the legislature has not provided a particular penalty unless the Public Service Commissions Law penalties are applicable, in which case both a civil penalty and a criminal prosecution have been expressly prescribed.

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The question whether the United Traction Company is or is not rendering reasonable, just and adequate service is also immaterial here. The law furnishes a proper remedy to meet an emergency if one exists. The grant of power and duty to the city is not changed by an emergency, nor can it authorize acts that are entirely prohibited by the law. The question of the duty of a city in such a case as this was specifically covered in *Brooklyn City R. Co.* v. *Whalen*, 191 App. Div. 737, from which I quoted extensively in my opinion in *United Traction Company* v. *Smith, supra.* In that case it was urged by the corporation counsel of New York city that the maintenance of the bus lines was justified by emergency and the inadequacy of the service of the street railway lines was put forward as creating the emergency. The court said at page 743: "If the welfare and convenience of the citizens require additional accommodations for transit such as would be furnished by established stage routes, there is a legal way to accomplish the result. The city has power to grant a franchise, subject to the determination of its necessity and convenience. But the city has no power of municipal operation; nor has it the right to authorize others so to use the streets without observing the conditions to a legal and regular grant of a franchise."

And at page 744, the court said: "Whether the plaintiff has failed in fulfilling the obligations of its franchise has nothing to do with the question now before us. If it has, the law affords a remedy. The orderly processes of the law are better and probably more effective than an attempt at correction by an unauthorized and illegal administrative act."

The corporation counsel in his brief herein urges that no peremptory writ of mandamus can issue since

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there is a dispute between the United Traction Company and the owners of the motor vehicles in question as to whether such vehicles are operating in competition with the United Traction Company and also as to whether one vehicle constitutes "a motor vehicle line or route." The answer is that no issue of fact is raised; it is only an issue of law upon conceded facts as I have shown in relation to whether or not the relator is entitled to bring this proceeding without showing a special interest. The statute makes the operation of these vehicles unlawful in that they are vehicles carrying passengers for hire at a rate of fare of fifteen cents or less for each passenger. Moreover, the General Construction Law, section 35, makes the plural number include the singular and I have already held in *United Traction Co.* v. *Smith, supra,* that the operation of a single vehicle upon a particular line or route constitutes a bus line or motor vehicle line or route within section 26. See, also, *Public Service Commission* v. *Fox,* 96 Misc. Rep. 283; *Public Service Commission* v. *Mt. Vernon Taxicab Co.,* 101 id. 497.

No question of competition is necessary to this decision and if there is any propriety in permitting the operation of bus lines where the traction company has failed to run its cars, or any propriety in supplementing the service furnished by the traction company upon its other lines, the law provides a legal remedy, which will not be ignored by this court in the making of its decision and the court can find no just reason for excusing the mayor for his failure to apply the law rather than to ignore the law in the solution of his problems.

The mayor in his answer alleges that, as mayor, he has been and is exercising his judgment and discretion and that he believes it would be an injustice to

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the public if any steps were taken to deprive the public of adequate transportation. In the very next paragraph of his answer, however, he asserts that the whole question of adequate, just and reasonable service is a matter for the public service commission. Thus he overlooks his own special duty enjoined upon him and the city by the statute and confesses that in assuming to protect the public he is usurping a function which is wholly the function of the public service commission.

This brings me to the question whether the writ should be issued requiring the mayor to perform any duty enjoined upon him by the law. The writ of mandamus is a remedy to be applied in the discretion of the court in a case where a clear legal right exists and where there is no other adequate remedy.

I have demonstrated that there is a clear legal right. Is there any other adequate remedy?

The chief claim of the respondent is that the matter lies within the jurisdiction of the public service commission either to investigate on its own motion or upon the complaint of another and to make an order, or to conduct a summary proceeding in the Supreme Court to have the unlawful act enjoined. It so happens, however, that it is not within the power of the public service commission to issue a self-executing order effective in all of these cases. The most the commission can do is to direct its counsel to proceed under either section 48 or section 57 of the Public Service Commissions Law which means that no general action can be taken; that each individual operating a jitney unlawfully must be proceeded against separately. It is also clear from the decisions of the court that a common carrier lawfully operating in a city has a standing in court as a plaintiff to do exactly the same thing, namely, to seek an injunction in each

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separate case. The commission can do no more as a prosecutor than can the United Traction Company.

Can either of these proceedings be deemed an adequate remedy in this extraordinary situation, where there is such a wholesale violation of the statute by over 500 vehicles in the city of Albany?

Some time ago this court issued an injunction in the case of *United Traction Co.* v. *Smith,* and pronounced the law on the subject. The lawlessness involved continues unabated and it requires no stretch of the imagination to reach the conclusion that the process of importing new jitneys to thus unlawfully operate in the city of Albany, could travel much faster than could the court and counsel under the remedy of piecemeal injunctions.

It is urged by the respondent that the petitioner and every citizen has an adequate remedy at law in procuring warrants for the arrest of these unlawful operators if the act is a crime.

Assuming that this might be so in the case of an isolated crime, it seems absurd to me to say that such a remedy is an adequate remedy, where there is a riot of such violations constantly committed upon the streets of the city by over 500 jitneys without let or hindrance of any kind from authorities charged with the enforcement of the law. Under such circumstances who will say that an adequate remedy is afforded by leaving to the citizen on the street the duty to swear out warrants, while the mayor and his commissioner of public safety and his police force stand idly by, the latter acting under the direct encouragement, if not the demand of the mayor, to adopt a hands-off policy, and where the mayor in a public statement has positively refused to act? The situation needs the restraining power of the whole police force acting under the whip of a mayor who with full power to act

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has put himself in motion, has substituted action for non-action, prohibition for permission.

The Penal Law, section 1841, provides that a public officer upon whom any duty is enjoined by law who willfully neglects to perform the duty, is guilty of a misdemeanor where no other penalty is specifically provided by statute. This is not an adequate remedy. A similar provision is found in section 1857 of the Penal Law.

In the case of *Goodell* v. *Woodbury*, 71 N. H. 378, it was held that a remedy by removal of the officer would not prevent mandamus to compel a chief of police to prosecute violations of the liquor law. The court said: "This remedy is clearly not an adequate one. At most, it cannot enforce the duty in question, and leaves the required act still unperformed. It is a fundamental rule that a remedy which does not compel specific performance is inadequate, and constitutes no bar to a writ of mandamus. To supersede it, a party must not only have a specific, adequate, legal remedy, but one competent to afford relief upon the very subject-matter of his application, and which is equally speedy, convenient, complete and beneficial. * * * It is quite too obvious for discussion that a petition to the commissioners for the defendants removal from office is not such a remedy. It is the inadequacy, and not the absence, of other legal remedies, coupled with the danger of a failure of justice, which determines the propriety of the relief by mandamus."

It is claimed that the commissioner of public safety should have been made a party to this proceeding; that it is not the duty of the mayor to personally enforce the penal statutes, but that such duty is a matter directly within the jurisdiction of the commissioner. I do not think that the commissioner is either

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a proper or necessary party to this proceeding. It does not appear that he has refused to act in the premises. True he has not acted but his non-action is directly traceable to the mayor who has assumed to take command of the situation. In effect the mayor has given his subordinates to understand that it is not their duty to act and that he as the chief executive officer of the city on advice of counsel has officially determined that the jitneys should be allowed to run. Non-action in the present case is directly traceable to the mayor who has assumed full authority and responsibility to, in effect, prohibit his commissioner of public safety and the police department from enforcing the law in question. Of course, he has not done this in so many words but such is the necessary effect of his action.

Under the peculiar provisions of the Second Class Cities Law direct responsibility for the enforcement of the laws of the state is in the mayor. It is his duty to see that the city officers and departments faithfully perform their duty; to maintain peace and good order within the city and to take care that the laws of the state are enforced within the city. § 54.

The commissioner of public safety has the supervision, control and direction of the police department. § 131. It is his duty to make all reasonable orders reasonably necessary to effect a prompt and efficient performance of all the duties imposed upon him and his department. It is the duty of the chief of police to enforce the rules and regulations of the commissioner. § 141. The police have the power and it is their duty to arrest any person found by them violating any of the laws of the state. § 142.

There is a whole train of officials from the mayor to the police officers, each responsible in his turn to his superior.

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The non-action of the police, the chief of police and the commissioner of public safety in the present case is directly traceable to the non-action of the mayor, who has assumed command of the situation. Their non-action is in effect his non-action.

In the case of *Goodell* v. *Woodbury, supra,* a motion was made to quash the petition because of the non-joinder of the solicitor of the county as a defendant. The court held that the motion was properly denied, saying:

"The fact that it is the duty of the solicitor to prosecute all offenses against chapter 112 does not impair or affect the obligation of the defendant to also enforce the provisions of that chapter. If the solicitor has neglected his duty, the defendant is not relieved from the legal consequences of his own neglect. 'A mandamus will not be refused merely because the desired relief may be obtained by applying to another officer.'

"But furthermore the bill of exceptions discloses no evidence that the solicitor has neglected or refused to prosecute offenses against chapter 112, or that he has in any way permitted their commission. So far as appears (and such is also the presumption), he has not violated his duty, and therefore should not be subjected to the imputation of wrongdoing which would attach to him as a defendant."

In that same case the defendant was required by law to "carry into execution within the city the laws of the state and all ordinances of the city."

The court said: "The obligation thus imposed on him to enforce the laws of the state within the city is both peremptory and plainly defined, and, having 'willfully and intentionally' refused to perform it, he cannot be permitted to set up successfully in bar of the plaintiffs' petition the defense of nonperformance

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through the exercise of the discretion with which to some extent he is necessarily clothed, but which nevertheless he cannot purposely and deliberately abuse, or exercise in an arbitrary or capricious manner, or so as to effect a failure of justice. (Citing authorities.) On the contrary, when, as here, the facts show a gross abuse of discretion, and a willful evasion of positive duty, scores of authorities hold that mandamus will lie (citing authorities); and it would be a reproach upon the administration of justice if the law were otherwise."

In the case of *State ex rel. Lay* v. *City of Hoboken*, 75 N. J. L. 315, it was held that mandamus requiring a municipal board to order that the entire interior of bars or business-rooms in the city in which intoxicating liquors are sold, should be, on Sunday, open to full view from the public streets of said city, as required by state law, may issue upon application of a private relator, who is a resident and taxpayer of the municipal district. The court said that the duty thus pointed out by statute is a ministerial one, clearly mandatory, and that mandamus is the proper remedy to enforce performance by public boards of such duties. It was also held that mandamus would not be denied on the ground that there was a remedy by indictment. The court said that indictment would not furnish a complete remedy; that while it might be the means of punishing the delinquent members, it would leave the public duty still unperformed, and that to justify the refusal of the writ on that ground, the other remedy must be specific and adequate.

In the case of *People ex rel. Brown* v. *Kennedy*, 102 Misc. Rep. 450, Justice Chester granted a peremptory writ of mandamus in a case where it appeared that practically all of the saloons in Cohoes were openly

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and notoriously violating the provisions of the Liquor Tax Law with respect to obstructions in their windows and that many of them were violating the provisions of said statute relating to obstructions which prevented a full view of the entire room.

A writ was granted to compel the commissioner of public safety, the chief of police and his subordinates to enforce or cause to be enforced all of the provisions of the Liquor Tax Law.

The court said that it was the duty of the commissioner to see and know that his orders were executed and that his subordinates faithfully performed the duties incumbent upon them. The court said: "If the violation alleged was one concerning an isolated case the attitude of the respondents could be looked upon with some degree of consideration, but when such violations are well nigh universal and general throughout the city, as appears by the detailed proof contained in the petition, it may fairly be assumed that notwithstanding the orders alleged by the respondents to have been given by them they do not intend to enforce the law by any measures which are effective."

A similar situation arose in *Matter of Whitney*, 3 N. Y. Supp. 838; 24 N. Y. St. Repr. 968, where it was held that a writ of mandamus requiring the police commissioners to enforce the provisions of the Excise Law, could be applied for by any citizen taking an interest in the observance and enforcement of that law. The statute in that case provided that it should be the duty of every sheriff, constable, policeman and officer of police, to enforce the observance of that law. The writ was denied in that case, but simply upon the ground that it had not been shown that the police commissioners did not intend to secure the observance of the law.

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In the case at bar the mayor has openly and publicly announced his positive refusal to act in the performance of the duty laid upon him by section 54 of the Second Class Cities Law.

There is no other adequate remedy. To refuse to grant this writ of mandamus would be to effect a failure of justice.

A writ of mandamus may issue commanding the respondent to maintain peace and good order within the city of Albany and to take care that the laws of the state are enforced within the said city by directing the commissioner of public safety to enforce by action of the police department of said city, the provisions of section 26 of the Transportation Corporations Law of the state.

The application is granted, without costs.

ISIDOR FUNT, Respondent, *v.* JACOB SCHIFFMAN et al., Appellants.

(Supreme Court, Appellate Term, First Department, February, 1920, Term — filed March, 1921.)

Sales — what insufficient to pass the property in the goods — actions — contracts — trial — evidence — damages — Personal Property Law, §§ 100, rule 4(1), 145(3).

Rule 4(1) of the rules declared by section 100 of the Personal Property Law for ascertaining the intention of the parties as to when the property in goods is to pass to the buyer, unless a different contention appears, provides that "where there is a contract to sell unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods there-

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upon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made." *Held,* that unless an appropriation to the contract of goods, delivery of which was tendered by the seller after manufacture, was made with the buyer's assent express or implied, such appropriation is insufficient to pass the property in the goods. (Pp. 159–160.)

A complaint set forth two causes of action, one for the purchase price of goods sold and the other for damages for defendants' breach of contract in cancelling and refusing to be bound thereby. Upon the trial, by the court without a jury, it appeared that after defendants had ordered from plaintiff certain coats of two designated style numbers designed and manufactured by plaintiff, a number of the coats of the first style were delivered to defendants, who though they accepted and paid for the goods refused a subsequent tender of the remaining coats of that style and without reason cancelled the order for the goods of the other style after a few of the coats of said style had been delivered, accepted and paid for. When the order for the goods was cancelled they were all in the course of manufacture. After they were completed, a few days after the order of cancellation, they were sold in the open market and the evidence tended to show that at the time of the sale, the market price had dropped twenty-five to forty per cent since the contract was made. The plaintiff was given judgment for the full contract price of the goods tendered and for the difference between the contract price and that for which the goods were sold in the open market, fixed by the court as the market price of the goods of the style numbers which the defendants had cancelled. Upon reversing the judgment and ordering a new trial; *held,* that the plaintiff's sole right of action, on the record as it stood, under the first cause of action alleged, was one for damages for non-acceptance of the goods and that the measure of damages was controlled by section 145(3) of the Personal Property Law. (P. 160.)

The trial judge as to the second cause of action, which was based on an anticipatory breach of contract, correctly applied the rule of damages which he should have applied upon defendants' refusal to accept and pay for the goods described in the contract constituting the subject matter of the first cause of action. (P. 161.)

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APPEAL by defendants from a judgment of the Municipal Court of the city of New York, borough of Brooklyn, ninth district, in favor of the plaintiff, after a trial by the court without a jury.

Abraham Solomon, for appellants.

Max Friedman, for respondent.

LEHMAN, J. The plaintiff seeks in his first cause of action to recover the purchase price of certain goods which the defendants ordered from him and which were tendered by him to the defendants, and in his second cause of action seeks to recover damages for the defendants' breach of contract "in cancelling and refusing to be bound by contract" for the sale and delivery of other goods. It appeared at the trial that the defendants ordered from the plaintiff twenty-five coats designated as style No. 937 at the price of thirty-four dollars and fifty cents per coat, and twenty-two coats designated as style No. 934 at the price of thirty-two dollars and fifty cents per coat. The style numbers are apparently the numbers of styles designed and manufactured by the plaintiff. Thereafter the plaintiff made and delivered to the defendants eleven coats of style No. 937 and the defendants accepted and paid for these coats, but they refused a subsequent tender of the remaining fourteen coats of this style number. They also cancelled without reason the order for goods of style No. 934 after seven coats of this style number were delivered, accepted and paid for. At the time when the order for these coats was cancelled, they were all in course of manufacture. The plaintiff completed them a few days thereafter, but the cost of completion does not appear. After the goods were completed the plaintiff sold them in the open market for twenty-five dollars a coat, and there

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is other evidence to show that at that time the market price had dropped twenty-five to forty per cent since the making of the contract. Upon this testimony the trial justice gave judgment for the plaintiff for the full contract price of the goods which he had tendered to the defendants and for the difference between the contract price and twenty-five dollars, which he fixed as the market price of the goods of the style numbers which the defendants had cancelled. Upon this appeal the only point that requires serious consideration is whether the learned trial justice applied the proper measure of damages. Previous to the enactment of article 5 of the Personal Property Law, popularly known as the Sales Act, there can be no doubt but that the plaintiff could have brought an action to recover the contract price of the goods which he manufactured in accordance with his order and tendered to the defendants. "When the vendee of personal property under an executory contract of sale, refuses to complete his purchase, the vendor may keep the article for him and sue for the entire purchase price; or he may keep the property as his own and sue for the difference between the market value and the contract price; or he may sell the property for the highest sum he can get and after crediting the net amount received, sue for the balance of the purchase money." *Ackerman* v. *Rubens*, 167 N. Y. 408.

The right of the vendor under an executory contract of sale to tender the goods to a vendee and to sue for the entire purchase price upon the refusal of the vendee to accept and pay for them, and thus in effect compel a specific performance of the contract, has never been recognized in many jurisdictions, and even in this state is now limited under the provisions of section 144 of the Personal Property Law. The drafters of the Sales Act undoubtedly intended to codify the gen-

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eral rules applicable to contracts of sale and so far as possible, to make them uniform in the various jurisdictions. Section 144 contains the provisions which are applicable to an action for the price of goods, and it would seem that under that section an action for the price can be maintained only in three cases. *First*, where under a contract to sell or a sale, the property in the goods has passed to the buyer; *second*, where the price is payable on a day certain irrespective of delivery or of transfer of title; *third*, where the goods cannot readily be resold for a reasonable price and the provisions of section 145, which regulates actions for damages for non-acceptance of the goods, are not applicable.

In the present case the contract contains no term making the price payable on a day certain irrespective of delivery or of transfer of title, nor does it appear that the goods cannot be resold for a reasonable price, or that the provisions of section 145 are not applicable. There can, therefore, be no action for the price under the Sales Act unless the property in the goods has previously passed. Section 100 of the Personal Property Law provides the rules for ascertaining the intention of the parties as to the time the property in the goods is to pass to the buyer, unless a different intention appears. Rule 4, subdivision 1, seems the only rule which is applicable to the present case. That rule provides that "where there is a contract to sell unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made."

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The seller by tendering delivery of the goods after they were manufactured undoubtedly appropriated the goods tendered to the contract, but unless that appropriation was made with the buyer's assent, express or implied, it was ineffective to pass property in the goods.

It may be that if the contract could be regarded as a contract to manufacture specially for the defendants, such assent to an appropriation after the goods have been manufactured in accordance with the contract might be implied, but in the present case it would seem that the contract is the ordinary contract for the sale of unascertained or future goods by description. The description is apparently the style number designed and ordinarily manufactured by the plaintiff, and it is not shown that they are not suitable for sale to others in the ordinary course of the seller's business. No materials were furnished by the defendants to be incorporated in the goods when made and the plaintiff could comply with his contract by tendering goods which he might have manufactured for the general purposes of his business. Under these circumstances I cannot find that any assent on the part of the defendants to the appropriation of the goods can be implied. It would seem to follow, therefore, that the plaintiff's sole right of action, upon the record, as it stands, of the first cause of action, is one for damages for non-acceptance of the goods, and the measure of damages in such action is controlled by subdivision 3 of section 145 of the Personal Property Law. In this regard I have not overlooked the statement of the Appellate Division of this department in the case of *Gourd* v. *Healy*, 176 App. Div. 464, that this statute "is merely declaratory of the common law as it theretofore existed." That statement is entirely accurate in regard to the question then under consideration by the

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Appellate Division, but the Appellate Division clearly did not intend to hold that the Personal Property Law has made no change in the common law rules as previously applied by the courts of this state. It follows that the wrong rule of damages has been applied in regard to the plaintiff's first cause of action.

It is also urged that the trial justice applied an erroneous rule of damages in regard to the second cause of action. The plaintiff's evidence shows that the defendants cancelled the order for goods of style No. 934 while some of the goods were not only still undelivered but were in course of manufacture. After this cancellation the plaintiff finished the garments and sold them for twenty-five dollars apiece, and there is evidence to show that this price was the market value of the garments, and the trial justice thereupon gave judgment for the difference between the contract price and twenty-five dollars per garment, which he held constituted the market price. He thus applied in the second cause of action the measure of damages which we have held he should have applied upon the refusal of the defendants to accept and pay for the goods described in the contract, which constituted the subject matter of the first cause of action. While it is evident that the two contracts are essentially similar, the defendants claim that a different measure of damages must be applied where the vendee cancels his contract while the goods are still in course of manufacture, from the measure which is applied where the breach occurs thereafter.

The Sales Act (Pers. Prop. Law, § 145) provides that in case the buyer repudiates "while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations * * * the buyer shall be liable to the seller for no greater damages than the seller would have suffered

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if he did nothing toward carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand," and the defendants urge that since there is no evidence to show the expense of completing the garments after the defendants' cancellation of the order, he cannot under the provisions of this section recover the damages which are based upon the loss which the plaintiff suffered by the defendants' failure to accept and pay for the finished garments. This contention of the defendants seems to me to rest upon a fundamental misconception of the meaning and intent of the statute and of the nature of the plaintiff's cause of action now under consideration.

This section of the statute, in my opinion, merely places a limitation upon the rule which has been laid down in its broadest form in *Forst* v. *Knight,* L. R. 7 Exch. 111, that in case of notice to a promisee of a promisor's intention not to perform his contract, " the promisee, if he pleases, may treat the notice of his intention as inoperative and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it." This rule was reiterated and applied in this state in the case of *Rubber Trading Co.* v. *Manhattan Rubber Manufacturing Co.,* 221 N. Y. 120, citing *Forst* v. *Knight, supra,* and other cases, but it has no application to the present case, for here the plaintiff did not treat the notice of cancellation by the buyer as inoperative but bases his right of action upon such notice as an anticipatory breach. It is true that he thereafter completed the garments, but the buyer did not thereby become liable to the seller for any greater damages " than the seller would have

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suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand." This section of the statute can apply only where the seller in spite of the notice of countermand fulfills his obligations under the contract and thereby is enabled to obtain greater damages than if he had ceased work under the contract upon the receipt of such notice. Such a case would arise where under the contract the seller could upon the complete performance of his own obligation compel the buyer to pay the full contract price, though the payment of the loss suffered by the seller if he had ceased performance at the time of the notice of countermand would have caused the buyer lesser damage. In the present case, however, the plaintiff would not be entitled to the full contract price, even if he had fully performed, and had tendered the goods to the defendants, as we have shown above, in considering the rule of damages to be applied in the case of an exactly similar contract in the first cause of action; and in any event the plaintiff here does not and cannot claim damages as upon a full performance, for though he completed the goods he did not tender them to the defendants. The defendants have not been compelled to pay the contract price but merely the difference between the contract and the market price, and in this view of the case it is quite irrelevant whether the seller after notice of countermand by the defendants completed the garments, which at all times remained his property and then sold the finished goods or whether he sold or otherwise disposed of the goods when partially completed.

The serious question on this branch of the case is not whether subdivision 4 of section 145 of the Personal Property Law applies, but whether the trial justice correctly applied to an action based on an

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anticipatory breach of contract the same rule of damages that he should have applied upon a refusal to accept at the time agreed upon for delivery, for that section would be entirely meaningless unless the legislature had recognized that a different rule of damages might at least in some cases be applicable in the case of anticipatory breach from that which is applicable to a breach at the time set for performance. There can be no doubt that prior to the enactment of the Sales Act, the rule in regard to contracts of sale of goods to be manufactured was as stated in the case of *Belle of Bourbon Co.* v. *Leffler*, 87 App. Div. 302: "Where the purchaser of goods to be manufactured repudiates the contract in advance of the manufacture of the goods or is guilty of a breach of contract which justified the vendor in suspending the further manufacture of the goods, and he does so, then the measure of damages is the difference between the cost of manufacture and the contract price." See to the same effect *Oswego Falls Pulp & Paper Co.* v. *Stecher Lithographic Co.*, 215 N. Y. 98. This rule is sound and logical if the contract which has been repudiated is in law a contract to manufacture and not a contract of sale or one in which property in the goods to be manutured was from the inception of the manufacture in the buyer, or one where upon completion the buyer could be held liable for the price, but it would seem that it cannot logically be applied to an ordinary action for the sale of future goods where the property in the goods would not pass till delivery and where the buyer could not be held liable for the price if he failed to take delivery. In the latter case, as stated by Professor Williston in his work on Sales, section 587: "The character of the breach cannot change the nature of the contract, and the damages must, therefore, be what the injured party suffered or is likely to suffer

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because of the failure of the defendant at the time he agreed to do so. * * * In any event though the plaintiff may bring his action at once, his damages must be based on the cost or value of the performance at the time fixed by the contract for that performance, not at the time of the breach." Under the common law rules as interpreted by the courts of this state it was "held here by a long course of decisions that an agreement for the sale of any commodity at the time but which the vendor is to manufacture or to put in a position to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to a manufacturer, is not a contract of sale. The New York rule lays stress on the word sale. There must be a sale at the time the contract is made." *Cooke* v. *Millard,* 65 N. Y. 352. Professor Williston in his work on Sales, section 563, points out that the so-called common-law New York rule as to the nature of the contracts leads logically also to the rule of damages applied in this state upon the breach of such contract, but the common-law New York rule as to the nature of the contract has been changed by section 85 of the Personal Property Law, so that the contract under consideration is now regarded as a contract of sale and not of manufacture, and the New York rule in regard to the nature of the seller's right of action is changed by sections 144 and 145 of the same statute. Since the contract was a contract of sale, and the evidence shows there was an available market for the goods in question and no special circumstances showing proximate damages of a greater amount such as might arise where the goods were to be manufactured specially for the buyer and were not readily salable in his own business, the measure of damages is the difference between the market price and the contract price of the goods.

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It follows that in the second cause of action the trial justice has applied the proper measure of damages. Judgment should be reversed and a new trial ordered, with thirty dollars costs to appellant to abide the event.

FINCH, J., concurring in the result.

Judgment reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

JACOB RICE, Respondent, *v.* MCALLISTER LIGHTERAGE LINE, INC., Appellant.

(Supreme Court, Appellate Term, First Department, February Term — filed March, 1921.)

Ships and shipping—negligence—charter-party—evidence—damages—trial.

While defendant was in possession of plaintiff's scow without motive power under a charter-party which included the services of a so-called "captain" whose duty it was to take care of the scow, it was towed in calm weather to a dock and moored alongside of a steamship for unloading. On the night of the next day the dock was exposed to the full sweep of a northwest storm which developed into a hurricane and as a result the scow was injured. *Held,* that evidence that the weather bureau had issued storm warnings some hours before the full strength of the hurricane developed, justified an inference that defendant, which rested at the close of plaintiff's case, was negligent in permitting the scow to remain in the position where necessarily it would be exposed to the full force of the storm, and that plaintiff was entitled to recover for all damage to the scow caused by such negligence.

Without deciding now, whether there was evidence tending to show that the captain was in fact negligent in any respect, an instruction repeated in effect several times that they could find for the defendant only if they believed that the accident

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was caused by the negligence of the captain while in control of the defendant, was prejudicial error for which a judgment in favor of plaintiff will be reversed and a new trial ordered.

APPEAL by the defendant from a judgment of the City Court of the city of New York, entered in favor of the plaintiff and from an order denying defendant's motion for a new trial.

Burlingham, Veeder, Masten & Fearey (Charles E. Wythe and William P. Allen, of counsel), for appellant.

Macklin, Brown, Purdy & Van Wyck (William Van Wyck and James. M. Gorman, of counsel), for respondent.

LEHMAN, J. In March, 1918, the defendant was in possession as charterer of a scow without motive power owned by the plaintiff. The charter included the services of a so-called "captain," whose duty it was to take care of the scow. On March 9, 1918, the scow was towed to a dock in Brooklyn and placed alongside of a steamship. The cargo of the scow was unloaded into the steamship on March ninth and March tenth. At the time when the scow was brought into position for unloading, the weather was very calm, but on March tenth a strong northwest wind sprang up, which during the night developed into a hurricane of somewhat extraordinary severity. The weather bureau issued storm warnings some hours before the full strength of the hurricane developed. The dock alongside which the scow was moored was apparently exposed to the full sweep of a northwest storm, and as a result of the hurricane, in the night of March tenth the scow was injured. The testimony produced by the plaintiff was not contradicted. The defendant rested at the close of plaintiff's case. In

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our opinion, the plaintiff's testimony was sufficient to allow the inference that the defendant was negligent in permitting the scow to remain in a position where it would necessarily be exposed to the full force of a northwest gale, after there were weather indications and storm signals which might have given warning of the approach of such a storm. The demise of the scow gave to the defendant as charterer full control of its movements, and if in the exercise of such control the defendant was negligent, the plaintiff has clearly a right to recover all damages to the chartered scow caused by such negligence on the part of the defendant. Unfortunately, however, I do not think that the trial justice submitted this question to the jury in a proper charge, but on the contrary, charged the jury clearly that the real question in the case was whether the accident occurred "while the captain was in discharge of his duties under the control of the defendant, or whether it happened in the discharge of his duties while he was under the control of the plaintiff. If you find that this accident occurred while the captain was in the discharge of his duties under the control of the plaintiff, then your verdict will be for the defendant. However, if you find that this accident occurred while the captain was under the control of the defendant and in the discharge of his duties in the employ of the defendant, then you will come to the question of whether or not in the discharge of his duties the captain exercised that ordinary degree of care which an ordinarily prudent person should have exercised under like circumstances." The defendant duly excepted to this charge, and if it constitutes error, it seems to me that the error beyond question was prejudicial, for the trial justice repeated it in effect several times, and the jury could not under the charge possibly bring in a verdict in favor of the

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defendant except upon the theory that the so-called "captain" was negligent in the performance of his duties, and that such negligence was imputable to the defendant.

As I have pointed out above, the demise of the scow included the services of a "captain" as caretaker. Since the charter constituted a demise, the full control and direction of the boat was vested in the defendant and since the defendant had a right to such control, it would be liable to third persons for any damages caused to the boat while in the defendant's care, even though the damage was actually caused by the captain whose services were furnished to the charterer as part of the charter. This rule seems sound in principle and is established by a number of decisions in the federal courts of this district. On the other hand, it seems to me equally clear, and almost as well established by authority, that where an owner charters a boat with a caretaker, the charterer cannot be held liable for any negligence or incompetence of the caretaker in the performance of the very duties for which he was furnished by the owner. In the present case, if the defendant was negligent in directing the captain to moor the scow in an exposed position, or in failing to remove it from such position after it should have been apparent to a man exercising reasonable care that the position was dangerous, it would be liable for the consequent injuries caused by its own negligence, and the same rule would hold true if it gave other negligent or improper directions to the captain, but the evidence in this case shows no specific directions to the captain to perform services not within his duty as caretaker, and if the captain was negligent at all it was necessarily in the performance of his duties as caretaker, for no other duties were assigned to him by the charterer, and for such negligence the charterer

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would not be liable to the owner. I must not, however, be deemed to have decided that there is evidence to show that the captain was in fact negligent in any respect. I am merely holding that it was error on the part of the trial justice to instruct the jury that they could find for the defendant only if they believed that the accident was caused by the negligence of the captain while in the control of the defendant.

It follows that the judgment should be reversed and a new trial ordered, with costs to the appellant to abide the event.

MULLAN and BURR, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

ZAMA FELDSTEIN, Respondent, *v.* BUICK MOTOR COMPANY, Appellant.

(Supreme Court, Appellate Term, First Department, January Term — filed April, 1921.)

Physicians and surgeons — when employer of injured employee liable for physician's services — section 13 of the Workmen's Compensation Law has reference only to fees incurred by workman for medical treatment.

The claim of a physician for professional services rendered at the request of defendant's superintendent, to several of defendant's employees, who were injured in the course of their employment, is not a part of the injured workmen's claim under the Workmen's Compensation Law.

The physician still retains the right to prosecute his claim by an action, and where neither the rendition of the services nor the reasonable value thereof is disputed, a judgment in favor of plaintiff for the amount claimed will be affirmed.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, borough of

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Manhattan, fifth district, in favor of the plaintiff after trial by the court without a jury.

Alfred W. Andrews (Philip J. O'Brien and James M. Baird, of counsel), for appellant.

Cohen Brothers (Lawrence B. Cohen and Jacob Shientag, of counsel), for respondent.

WAGNER, J. This action was brought by plaintiff, a physician, to recover the reasonable value of professional services he rendered at the request of defendant's superintendent to several of defendant's employees who were injured in the course of their employment. The defendant resisted the claim, contending that under the Workmen's Compensation Law the plaintiff's exclusive remedy to recover the money value of his services was by application to the industrial commission upon whom the law imposed the duty of fixing plaintiff's fees, hence the Municipal Court had no jurisdiction over an action of this character.

There was no dispute as to the rendition of the services nor as to their reasonable value. Unconvinced by defendant's legal contention the court below rendered judgment for plaintiff, from which judgment and an order denying a motion for a new trial, this appeal is taken.

The Compensation Law requires that an injured employee be given necessary medical services when injured in the course of his employment. That duty primarily falls upon the employer. If he refuses the employee's request for such aid or neglects to furnish the proper service, the employee may select his own physician. Workmen's Compensation Law, § 13. Manifestly, therefore, the defendant here was legally obligated to furnish the services to its injured

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employees for the value of which plaintiff seeks to recover in the instant case.

May he enforce his claim by an action at common law or is he by statute law restricted to an application before the industrial commission for the fixation of his fees?

In support of his contention that plaintiff can enforce his claim only by application to the industrial commission, the defendant cites us the case of *Semmen* v. *Butterick Publishing Co.*, 101 Misc. Rep. 285. In that case an employee sued the employer for a sum of money claimed to have been expended for medical services required because of injuries sustained while employed in defendant's factory. The court held that the employee, where the employer refused or neglected to provide medical aid, could not begin an independent action at common law to recover his expenditures; that the compensation law did not extend the common-law rights of the employee, but that "it operates to the exclusion of the common law rights and liability of master and servant in so far as it extends to accidental injuries sustained by the employee while engaged in any of the various sorts of hazardous employments which are mentioned in the statute." That compensation given by the act cannot be supplemented by compensation afforded by the courts of common-law jurisdiction. And since expense incurred by the injured employee in his efforts to regain his health is embraced or included in his award no separate recovery by action can be had. Section 24 provides that claims for such services shall not be enforced unless approved by the commission and section 26 provides for the enforcement of such claim by the commission.

"Reading these provisions together," the court said, "it seems that the legislature intended to invest

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the commission with full power over such claims and with full power to enforce them."

The facts and the law involved in the *Semmen* case have no application to the case at bar. Here the employer contracted for plaintiff's services, not the employee. Here the physician is endeavoring to enforce his claim against the employer. In the *Semmen* case the employee attempted in an action at common law to enforce her claim for medical services against her employer who had refused to provide any.

My investigation has failed to disclose any case in which the precise question here presented has been passed upon nor has counsel cited us any apposite authorities.

It is a "tiresome truism" to assert that the Workmen's Compensation Law was passed as its name indicates for the benefit of workingmen. The common law of employers' liability, together with its statutory modifications, the legislature deemed inapplicable to modern industrial conditions. The common experience of the workman who had been injured in his employment constituted reprimand and condemnation of the insufficient remedies of the common law. By these primitive rules of presumption he was more often presumed out of the court than a proper regard for humanity should tolerate.

Such a system of jurisprudence was so adverse to human sentiment and so fundamentally wrong that the legislature resolved to correct it by the enactment of the Compensation Act. Thereafter a workman was to receive damages for his injuries whether the employer or employee was at fault. The amount to be paid was dependent only upon the extent and duration of the disability and the earning power of the workman. Thus the uncertainty and expense of litigation were eliminated. The legislature was con-

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cerned only with the injured employee's welfare and compensation. It provided a new and exclusive method of assessing and collecting his damages, including his medical expenses. It was not concerned with claims against employers by other than injured workmen, even though the services for the payment of which claim is made were rendered because of duties imposed upon him by the Workman's Compensation Law.

Reading section 13 in the light of the legislative intent and purpose, it seems clear that the sentence "All fees and other charges for such treatment and services shall be subject to regulation by the commission as provided in section twenty-four of this chapter, and shall be limited to such charges as prevail in the same community for similar treatment of injured persons of a like standard of living," has reference only to fees and charges incurred by the workingman for medical treatment where the employer refuses or neglects to provide such treatment.

This is the more clearly indicated by a reading of section 24. That section provides for the approval of the value of the services by the commission and the inclusion of the charge as part of the workman's award, showing convincingly that it is the charge incurred by the employee and not the employer that is subject to regulation by the commission.

No attempt to regulate private arrangements entered into between the employer and the physician he might select is either expressly made or by implication to be spelled out of its provisions, and wisely so for in no way could that be a matter of public concern. Nor is there any plan or schedule set forth for enforcement thereof. Recourse to a court of law, therefore, follows as the sole remedy in the absence of a proper,

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expressed and comprehensive provision for enforcement under the act.

It is clear, therefore, that where the physician's claim is based solely on an agreement with the employer and is not a part of the injured workman's claim for compensation, the compensation commission is without legal authority to fix the fee and enforce it, and the physician still retains his right to prosecute his claim in a common-law action. The court below therefore had jurisdiction to determine the claim and the judgment is accordingly affirmed, with twenty-five dollars costs.

McCOOK, J., concurring in the result.

Judgment affirmed, with twenty-five dollars costs.

LUCY E. DOHERTY, Respondent, *v.* MONROE ECKSTEIN BREWING COMPANY, etc., Appellant.

(Supreme Court, Appellate Term, First Department, January Term — filed April, 1921.)

Landlord and tenant — when tenant discharged of his duty to pay rent when use of premises is restricted by law — Constitution of the United States, Eighteenth Amendment — Volstead Enforcement Act.

The rule that where a party by contract creates a duty upon himself, he is bound to make good if he can, notwithstanding any inevitable accident or unforeseen contingency, has no application where performance becomes impossible by a change in the law or as a result of action taken under governmental authority.

Since the adoption of the Eighteenth Amendment to the Constitution of the United States and the enactment of the Volstead Enforcement Act, the tenant under a written lease which in terms limited and restricted its use of the premises to the saloon business, is discharged of its duty to pay rent from and after the date when said amendment became effective.

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APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, sixth district, in favor of the plaintiff after trial by the court without a jury.

Prince & Nathan (Sidney J. Loeb and Leon M. Prince, of counsel), for appellant.

Levy & McMahon (Nathan D. Levy, of counsel), for respondent.

WAGNER, J. The plaintiff instituted suit against the defendant brewing company for rent for the months of January to October, 1920, for the use of premises occupied by it as a saloon under a written lease which included the following provision: "It being expressly agreed, that the only business to be carried on in said premises is the saloon business." A further clause contained in the lease provided for indemnity by the tenant for loss or damage by reason of the maintenance by the tenant "of a saloon or place for the sale of malt, strong, spirituous, or intoxicating liquors * * *." The tenant by way of defense denied liability for rent accruing beyond the month of January, 1920, by reason of the passage of the Eighteenth Amendment to the federal Constitution and the enactment of the subsequent Volstead Act and claimed resulting abrogation from obligation to pay rent thereunder. This amendment forbidding the manufacture of intoxicating liquors after one year from its ratification, sale or transportation was by proclamation of the acting secretary of state dated January 29, 1919, declared duly ratified by the legislatures of thirty-six states, certified as valid, and became effective from and after the 29th day of January, 1920, which in turn was followed by the supplemental

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enforcement law commonly known as the Volstead Act.

The defendant's license to sell intoxicating liquors having expired and none being possible of procurance thereafter, it discontinued the maintenance of the saloon business which it had previously conducted and resisted the later demands of the plaintiff for rent on the ground that the enactment of the so-called Prohibition Law worked an exoneration of its liability under the lease.

The general rule is that where the law creates a duty and a person without fault on his part is disabled from performing it, failure to perform is excused; but where a party by contract creates a duty upon himself, he is bound to make good if he can, notwithstanding any inevitable accident or unforeseen contingency; but the rule has no application where performance becomes impossible by a change in the law or as a result of action taken under governmental authority. The rule is thus stated by Parsons on Contracts, at volume 2, page 674: "That the illegality of a contract is in general a perfect defense must be too obvious to need illustration. It may indeed be regarded as an impossibility as an act of law; and it is put upon the same footing as an impossibility by act of God, because it would be absurd for the law to punish a man for not doing, or in other words to require him to do that which it forbids his doing. Therefore if one agrees to do a thing which is unlawful for him to do, and it becomes unlawful by an act of legislature, the act avoids the promise."

To the same effect see *Brick Presbyterian Church* v. *City of New York*, 5 Cow. 538; *Baker* v. *Johnson*, 42 N. Y. 126; 3 Elliott Cont. § 1901; Bishop Cont. § 594; Wharton Cont. § 305.

The principle rests upon the maxim *lex non cogit*

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ad impossibilia, or as phrased by Hannen, J., in *Bailey* v. *DeCrespigny,* L. R. 4 Q. B. 180, upon the ground that it is "not reasonable to suppose that the legislature, while altering the condition of things, with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the legislature itself prevented his fullfilling."

This court in *Adler* v. *Miles,* 69 Misc. Rep. 601, after reviewing the authorities on this subject, held that the performance of a contractual relation was excused by a supervening condition brought about by the operation of a change in the law which made its performance illegal. In that case the defendant when sued for rent claimed that while originally it was lawful for him to conduct a motion picture business on the premises which constituted what then was known as a "tenement house," subsequently an ordinance was passed which provided that no license for such purpose should be granted when a show was given in a building known as a tenement house, and that consequently the lease terminated by act of law. Justice Seabury writing for this court said: "The parties to the lease contracted to do a thing which at the time the lease was made was lawful. Public authority, in accordance with law, has provided that the very thing, which the parties in their lease contemplated, should not be done. To carry out the lease according to its terms has now become unlawful. It follows, therefore, that the lease cannot be performed according to its terms; and under such circumstances the obligation of the lessee to pay rent is discharged * * *. Section 231 of the Real Property Law recognizes the doctrine of these cases and provides that, whenever the lessee shall use the premises for an illegal business, the lease shall become void. Here the lease restricted the use of the premises to a purpose

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which was subsequently prohibited by law; and for the tenant to have used the premises for the sole purpose for which the lease authorized them to be used would, under section 231 of the Real Property Law, have avoided the lease."

In the instant case the lease made to the brewing concern expressly limits and restricts the lessee's use of the premises to the saloon business. No other purpose is authorized. The presence of words of restriction is, therefore, equivalent to an express covenant not to put the premises to any other use. *Chautauqua Assembly* v. *Alling*, 46 Hun, 582. It follows accordingly that if it should be found upon the facts appearing in the record before us that a continuation of the use of the premises in question as intended by the parties would be violative of the fundamental law we would be compelled to hold that the law as changed *ex proprio vigore* terminated the lease and discharged the lessee from future requirements in the payment of rent. For in that event the lease became void because the use contemplated by the parties was one in express contravention of the statute.

Our inquiry narrowing down eventually to one of judicial construction of the phrase "saloon business" as used in the instant lease, we are forced to examine the circumstances and conditions surrounding the parties at the time of their signature to the instrument of demise, in order to ascertain the true intent and purpose of the parties in its inclusion as a covenant. While words used in contracts are ordinarily to be interpreted in accord with their usual meaning it is our duty as nearly as we can to place ourselves in the situation which confronted the parties at that time and with a view of all the surrounding circumstances seek to arrive at the meaning rightly to be ascribed

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to the language employed. *Mecca Realty Co.* v. *Kellogg Toasted Corn Flakes Co.*, 166 App. Div. 74.

It appears that the defendant was a brewery corporation and had for nine years prior to the enactment of this lease been selling malt liquors of its own manufacture in these premises where a saloon was conducted. The plaintiff knew that the saloon had been operated during that period for the sale of spirituous and intoxicating liquors, and in the light of such knowledge as to the previous character of business transacted prepared the present lease, with express limitation of use to a saloon business. We think that in view of the prior unquestioned and concededly known use of the premises, together with that provision of the lease regarding indemnity by reason of the maintenance of "a saloon or place for sale of malt, strong, spirituous or intoxicating liquors," the clear indications of the lease and the circumstances which surround the parties, are that they were specifying their own definition of the word saloon and intending it to cover and apply to the precise use theretofore made, and a use later forbidden by legislative act. In so construing the word, we are of the opinion that we are giving the effect to the language which the parties clearly intended to be given, and which further accords with the present, common, acceptation of the term. Whatever former distinctions or refinements in meaning have been made with respect to the word "saloon," we think as the Supreme Court of Washington did in *Stratford* v. *Seattle Brewing Co.*, 162 Pac. Repr. 31, that the word saloon has acquired a very definite general meaning as a place where intoxicating liquors are sold and that as such it is generally understood.

While neither counsel in their briefs nor this court upon an extensive investigation has been able to find

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any decision in this state directly in point, to our minds the case most closely analogous and which involved as this a brewing company as defendant is *Heart* v. *Brewing Co.*, 121 Tenn. 69. In that case the complainant had leased a house and lot in Knoxville to the defendant for eight years to be used as a saloon or place for the sale of intoxicating liquors and the action was brought to recover rent for the month of November, 1907. The chancellor sustained a demurrer to the appeal on the ground that the sale of intoxicating liquors was made unlawful and prohibited in Knoxville after November 1, 1907, and that, therefore, the purpose for which the lease was made was illegal and the contract void and unenforcible. The court said upon appeal: "There is no error in the action of the chancellor. When the contract was made, the purpose for which the property was leased — the sale of intoxicating liquors in Knoxville — was lawful and the lease valid and enforceable. Afterward, November 1, 1907, that purpose was made unlawful by the acts of the general assembly above referred to, and thus by operation of law the lease became and is void and unenforceable at the instance of either party. It is a principle of general application that all contracts are void which provide for doing a thing which is contrary to law, morality and public policy. * * * The rule is the same when the purpose of the contract although lawful when made becomes unlawful by statute enacted before the full performance of its terms. * * * It is not necessary in this case to determine whether or not the contract contained in the lease restricts the use of the property for the sale of intoxicating liquors. It was the purpose of both lessor and lessee, as clearly expressed in the instrument that it should be used as a saloon, and,

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this being made unlawful by law the contract is no longer enforceable."

It is contended, however, by respondent that a lease of property solely for saloon purposes is not terminated by the taking effect, during the term, of a prohibitory liquor law, where by the construction or conduct of the parties, either the right was conferred on the lessees, or without protest the lessees sold upon the premises also non-intoxicating beverages and tobacco, so that the right of the lessee to operate his business was not entirely destroyed, and *O'Byrne* v. *Henley,* 161 Ala. 620; *Hecht* v. *Acme Coal Co.,* 117 Pac. Repr. 133; *Matter of Bradley,* 225 Fed. Repr. 308, all decisions of courts of high authority sustaining this position, are cited to us. With due respect to the courts of their origin and without discussing their distinguishable features in certain respects, we are reluctantly constrained to disagree with the construction of the phrase there laid down, regarding it as neither grounded in reason nor made in the light of the evident intentions of the parties.

In the case at bar the cardinal purpose of the lease and the obvious intention of the demise as we see it was the dispensation of intoxicants. That was its primary and principal purpose. Other commodities which perchance might have been sold for the convenience of those who patronized the premises, and of subsidiary character and importance, were but secondary and incidental to the main business there conducted. Instead of qualifying the purpose they but added to its scope without change in that primary and dominating purpose. Terse expression of our view is found in *Stratford* v. *Seattle Brewing Co., supra,* where in the course of the opinion answering the same point raised here the court said: "Nor are we impressed with idea advanced by appellants that the

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'saloon business' does not necessarily mean a business of selling intoxicating liquors, but may mean a business or place for the sale of non-intoxicating drinks. * * * The fact that what are commonly called 'soft drinks' are also generally sold at such places does not alter the character of such places as 'saloons,' nor is a place where soft drinks only can be sold commonly known as a saloon."

But it is claimed that the parties if they wished could have avoided any doubt as to the legal result flowing from a contingency such as this by providing protection therefor in the lease, and that therefore the defendant's failure to include such a provision preempted it from any claim of right in its subsequent conduct. That may be so, but a like charge of dereliction may be laid at the door of the lessor. The contract was made in the light of the law as it existed at that time and they were not bound to anticipate that future legislation would prevent a performance of their obligations. Such contemplation cannot be charged to the minds of the parties at the time the contract was made.

We reach the conclusion, therefore, that upon the facts in the case before us, the lessee has been prevented by the enactment of the prohibition statute from performing its obligations under the terms of the lease and that it was discharged of its duty to pay rent for the premises after such enactment.

The judgment is modified by reducing the same to the amount of rent for the month of January, 1920, only and as so modified affirmed, with twenty-five dollars costs to appellant.

GUY and MCCOOK, JJ., concur.

Judgment modified and as so modified affirmed, with twenty-five dollars costs to appellant.

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RUDOLPH DANIELSEN, Appellant, v. SIGSBEE, HUMPHREY & CO., INC., Respondents.

(Supreme Court, Appellate Term, First Department, January Term — filed April, 1921.)

Municipal Court of the city of New York — jurisdiction — seaman's wages — ships and shipping — judgments.

The Municipal Court of the city of New York has jurisdiction of an action brought by a seaman to recover wages, and an order dismissing the complaint on the ground that the court had not jurisdiction, and the judgment entered thereon, will be reversed with leave to defendants to serve an answer.

APPEAL by plaintiff from judgment and order of the Municipal Court of the city of New York, borough of Manhattan, first district, dismissing his complaint on the ground that the Municipal Court had no jurisdiction of the action.

Silas B. Axtell (Arthur Lavenburg, of counsel), for appellant.

Harrington, Bigham & Englar (Horace M. Gray, of counsel), for respondents.

McCOOK, J. This action is brought by a seaman to recover wages against a private corporation and the United States Shipping Board Emergency Fleet Corporation. The plaintiff alleges that he was regularly employed as a member of the crew of the vessel *Cabegon* and was wrongfully discharged. Plaintiff alleges the ownership of the vessel in the following language:

"*Third.* Upon information and belief, that at all time hereinafter mentioned, the defendants owned and/or operated and/or managed and/or controlled a certain merchant vessel known as the *Cabegon.*"

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Defendant Sigsbee, Humphrey & Co., Inc., moved to have this paragraph made more definite and certain, and the trial court, upon such motion, held it had no jurisdiction of the action and dismissed the complaint, relying as shown by the opinion upon *Roche* v. *McCaldin*, 1 Misc. Rep. 174.

The basis of *Roche* v. *McCaldin*, *supra*, is chapter 410, section 1286, subdivision 4, of the Laws of 1882, which re-enacts in substance chapter 71, section 2, of the Laws of 1819.

In 1819 the present Municipal Court was not established, but a similar court, presided over by the "Assistant Justice of the City of New York" was then in existence. By the Laws of 1819, chapter 71, it was provided:

"I. * * * That the justices court in the city of New York, having marine jurisdiction, shall be called and known by the name of the marine court of the city of New York. * * *

"II. * * * That the assistant justices of the city of New-York, shall not have jurisdiction to hear and determine any actions to be brought by any seaman or mariner, or other person, belonging to any ship or vessel, for seaman's wages, particularly mentioned and specified in the one hundredth and sixth section of the act hereby amended."

The statute above quoted referred to section 106 of the Revised Laws of 1813, chapter 86, which gave jurisdiction of all actions for seaman's wages to the Justices Court. The name of the "Justices Court" by chapter 71 of the Laws of 1819 was changed to the "Marine Court" and later became our present City Court, while the "Assistant Justices," of whom there was one for each city ward, as created by the Laws of 1807, chapter 139, eventually became our present Municipal Court.

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The Code of Civil Procedure adopted in 1849, in which the laws relating to Justices Courts in the city of New York were incorporated, provided in section 468 that "all statutory provisions inconsistent with this act, are repealed." However, *Collins* v. *Underwood*, 1 E. D. Smith, 318, decided in 1852, held that the provisions of the Code had not repealed the prohibitory act depriving the District or Justices Courts of jurisdiction in actions brought for the recovery of seamen's wages.

By chapter 741, section 4, Laws of 1870, the Code was amended in reference to jurisdiction of District Courts as follows: "Section 66 of the said Code is hereby amended so as to read as follows: The district courts of the City of New York shall have such jurisdiction as is provided by special statutes."

Turning to the Laws of 1882, chapter 410, which was "An act to consolidate into one act and to declare the special and local laws affecting public interests in the city of New York," we find under section 1284 that District or Justices Courts in the city of New York shall "have such jurisdiction in civil actions and special proceedings as is specially conferred upon them by statute, and no other." Section 1285 gives such courts the jurisdiction therein prescribed: "Except as otherwise provided in the next section."

The next section, viz., 1286, excludes jurisdiction in certain cases, and among them the cases named in subdivision 4, which reads as follows: "Where the action is brought by any seaman or mariner, or other person belonging to any ship or vessel against the owner or owners, master or commander of any such ship or vessel, for or by reason of the non-performance or breach of any agreement or contract made by such seaman or mariner, or other person, with the said owner or owners, master or commander, for services,

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or compensation for service, on board of any ship or vessel, during any voyage performed, or in part performed, by such ship or vessel."

Section 2143 provides:

"Sections * * * [enumerating various sections] twelve hundred and eighty-six, except subdivisions four and five * * * of this act being intended only to contain the substance of certain sections of the Code of Civil Procedure * * *, shall not be construed as making any new enactment, or as repealing, modifying, amending or superseding any provision of * * * said Code but shall be treated and considered as embraced in this act solely in order that it may contain all provisions of existing laws which are of special application in the city of New York."

It is clear from the marginal note to the official edition of the Laws of 1882 that the source of section 1286 was section 2863 of the Code with the exception of subdivision 4, whose source is stated to be section 2, chapter 71 of the Laws of 1819.

At this point it is essential to ascertain the effect of the Consolidation Act of 1882, chapter 410. In view of the title to the act, was there a repeal by implication of chapter 71 of the Laws of 1819? Do the provisions of section 2143 change the ordinary rule in reference to repeal by implication? The same questions were raised in *Matter of New York Institution for Instruction of the Deaf and Dumb*, 121 N. Y. 234. In that case the question was whether section 8 of the act of 1865, relating to acquiring land, levying assessments, etc., for the laying out of Central Park, was repealed by the same Consolidation Act we are now discussing. In that case the court said: "We have not, therefore, a case where some prior statute has been wholly omitted and no provision of any kind substi-

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tuted in its place. But this is a case where the prior provision of law has been entirely dropped, and provisions upon the same subject are found in the new act. Under such circumstances how is the Consolidation Act to be construed? It was the manifest intention of the legislature that it should take the place of the numerous special and local acts applicable to the city of New York, which had been enacted for more than a century, and to rescue them from the obscurity, uncertainty and difficulty caused by their scattered condition; and that intention should have effect. * * * We have, therefore, reached the conclusion that section 8 of the act of 1865, although not specially repealed was superseded by the Consolidation Act, and that the order of the General Term should, therefore, be affirmed with costs."

In the case just cited, the provisions of the omitted section were covered by other legislation in the new enactment which did not follow the omitted provisions. For this reason the Court of Appeals held that the former act was superseded. In the case at bar, the provisions of the old act (Laws of 1819, chap. 71) were incorporated in the new act by the use of almost the identical language, and, in addition, the effect of such provisions was extended so as to cover not only actions for seamen's wages, but also any action for services brought against an owner or master of a vessel, providing such services were rendered during any voyage of such vessel. Thus the new act is somewhat broader than the old. Section 2143 seems to have been incorporated in the new act for the purpose of protecting Code sections and certain other laws, therein enumerated, against repeal by implication, stating that they were incorporated therein for the sake of embracing all provisions affecting the city of New York in one act. It is significant that subdivi-

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sion 4 of section 1286 was expressly excepted from the operation of the provisions of section 2143. The legislators knew the source of this subdivision, and yet did not state that section 2 of chapter 71 of the Laws of 1819 was not to be deemed to be repealed or superseded by the new act, which enlarged the scope of the original act. It is a fair inference that they thus intended that the old act should be superseded, and that they contemplated that the consolidation should repeal or supersede some prior enactments is obvious from the language used in section 2143.

Chapter 580 of the Laws of 1902 is the Municipal Court Act. Section 1 states the jurisdiction, which is wide enough to include the plaintiff's claim in the present case. Section 364 repeals "the laws or parts thereof, specified in the schedule hereto annexed." Then comes the "schedule of laws repealed," with a list of laws and sections in which appears at page 1596 (Laws of 1902, vol. 2) the following: "1286. * * * No jurisdiction in certain cases."

Thus by a double identification we have the provision in question done away. We find section 2, chapter 71 of the Laws of 1819, was superseded by the Consolidation Act (Laws of 1882, chap. 410, § 1286, subd. 4), and that section 1286 of chapter 410 of the Laws of 1882 was repealed by chapter 580 of the Laws of 1902, and that the right of the plaintiff in this action to sue in the Municipal Court is conferred by the Municipal Court Act. The present Municipal Court Code (Laws of 1915, chap. 279) states the jurisdiction, which is wide enough to include this plaintiff's claim, and contains no provision denying jurisdiction to the Municipal Court in the present case.

In passing, it may be said that *Roche* v. *McCaldin*, *supra*, relied on by the court below, was decided while section 1286 of the Laws of 1882 was in effect, namely,

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in 1892, and thus before the repeal of 1902, and hence the question here presented was not before that court.

The court below, therefore, erred in dismissing the plaintiff's complaint as to defendant Sigsbee, Humphrey & Co., Inc., on the ground that the Municipal Court had no jurisdiction of the action, and also in dismissing the complaint as to the defendant Shipping Board. *Ingersoll-Rand Co. v. United States Shipping Board Emergency Fleet Corporation*, 195 App. Div. 838.

Judgment and order reversed, with ten dollars costs, and motion denied with leave to defendants to serve answers within five days after service of copy of order to be entered hereon, upon payment of said costs.

GUY and WAGNER, JJ., concur.

Judgment and order reversed, with ten dollars costs.

THE A. N. P. REALTY COMPANY, INC., Landlord, Appellant, *v.* LOUIS TUNICK, etc., Tenant, Respondent.

(Supreme Court, Appellate Term, First Department, February Term — filed March, 1921.)

Summary proceedings — monthly tenancy — when pleading of notice unnecessary — Laws of 1882, chap. 203, as amended by Laws of 1920, chap. 209.

A statute requiring a landlord to give notice of his intention to terminate a tenancy has no application where the tenancy is terminated by the act of the tenant.

Where a petition in summary proceedings against a monthly tenant holding over without the permission of his landlord alleges that the tenant, about the end of a certain month, notified petitioner that he would quit and surrender the premises, located in the city of New York, on the first day of the succeeding month, the dismissal of the petition for failure to allege

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that the landlord had given the tenant the notice required by chapter 203 of the Laws of 1882, as amended by chapter 209 of the Laws of 1920, is error, and the final order entered thereon in favor of the tenant will be reversed and a new trial ordered.

APPEAL by the landlord from an order dismissing the landlord's petition in the Municipal Court of the city of New York, borough of The Bronx, second district, for the removal of the tenant as a holdover.

I. L. Broadwin, for appellant.

Rosenberg & Rosenberg (Max Rosenberg, of counsel), for respondent.

LEHMAN, J. The petition herein alleges that the tenant was a monthly tenant of premises owned by this landlord and that "in or about the end of October, 1920, the said Louis Tunick notified the petitioner herein that he the said Louis Tunick would quit and surrender the said premises on November 1, 1920, but holds over without the permission of the landlord." The tenant moved to dismiss this petition on the ground that it failed to allege that the landlord had given the tenant the notice required by chapter 203 of the Laws of 1882, as amended by chapter 209 of the Laws of 1920, and the trial justice granted this motion.

In the case of *Hoske* v. *Gentzlinger*, 87 Hun, 3, the court held that the statute upon which the tenant relied "was enacted for the benefit of tenants. It required from a landlord a notice of his intention to terminate a tenancy, and protects tenants from removals without being afforded an opportunity to secure other property. But it has no application to a case where the tenancy is terminated by the act of the tenant. In such a case there is no reason that the landlord should serve a notice, and such a requirement

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would be a useless one." In that case the landlord did not seek the remedy of summary proceedings but was himself sued for damages for an alleged wrongful action and the tenant seeks to distinguish that case on that ground, claiming that since the right to bring summary proceedings is purely statutory, the petition must allege all the facts necessary to bring the case within the provisions of the statute permitting such remedy and no plea or proof of other facts is sufficient to give the court jurisdiction nor can such jurisdiction be conferred by consent of the parties.

The petition of the landlord alleges all the facts required by section 2231 of the Code of Civil Procedure to give the court jurisdiction. The statute upon which the tenant relies does not give the court any new jurisdiction or provide for any new form of proceeding, but, on the contrary, it merely provides a condition precedent for the benefit of the tenant before the landlord can use the remedy which the legislature had previously created. Since that condition precedent was created solely for the benefit of the tenant, the tenant has a right to waive it and he does waive it when he himself gives notice of his intention to remove from the premises. Such waiver does not confer upon the court any new jurisdiction not granted by the legislature but merely removes the limitation upon the right of the landlord to bring such proceedings which the legislature had seen fit to enact for the benefit of the tenant.

Final order should, therefore, be reversed and a new trial ordered, with ten dollars costs to appellant to abide the event.

MULLAN and BURR, JJ., concur.

Final order reversed and new trial ordered, with ten dollars costs to appellant to abide event.

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EDWARD J. ROGAN and Another, Appellants, v. "RACHAEL" WEISS, Respondent.

(Supreme Court, Appellate Term, First Department, February Term — filed April, 1921.)

Landlord and tenant — monthly tenancy — when landlord may recover a fair and reasonable rent from tenant holding over — service of notice not a condition precedent — Laws of 1882, chap. 203, as amended by Laws of 1920, chap. 209.

Where a monthly tenant of premises in the city of New York holds over after the expiration of his term, without the permission of his landlord, the landlord under chapter 944 of the Laws of 1920 may recover a fair and reasonable rent while the tenant continues in possession of the premises, and a dismissal of the complaint on the ground that service upon the tenant of the notice specified in chapter 203 of the Laws of 1882, as amended by chapter 209 of the Laws of 1920, was a condition precedent to the maintenance of the action, is error for which a judgment entered in favor of the tenant will be reversed and a new trial ordered.

APPEAL from a judgment of the Municipal Court of the city of New York, borough of The Bronx, second district, entered in favor of the defendant.

Robert Moers (Harry Cohen, of counsel), for appellants.

Thomas G. Price (Harry Crone, of counsel), for respondent.

LEHMAN, J. The landlord has brought an action for the rental value of premises occupied by a monthly tenant. His complaint was dismissed on the ground that before the landlord can bring such an action he is required to serve upon the tenants the notice specified in chapter 203 of the Laws of 1882, as amended by chapter 209 of the Laws of 1920. Prior to the enact-

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ment of that statute, a monthly tenant could be removed by the landlord at the expiration of the month without any previous notice, because a monthly tenancy is a tenancy for a definite period, and a tenant occupying premises for a definite period is compelled to quit the premises at the end of such period. The statute did not create a new kind of tenancy, and the tenant has always had the right to remove from the premises at the expiration of his term, but it took away from the landlord the right to remove the tenant by summary proceedings or by re-entry obtained in any other way, unless he had previously given the required notice to the tenant. For practical purposes, if the tenant could not be removed from the premises without a previous notice, the statute had the same effect as if it had provided that unless the landlord gave previous notice to the tenant, the tenant had the option of automatically renewing his monthly tenancy at the expiration of the month by remaining in the premises. In other words, it compelled the landlord to accept the tenant as a holdover without any alternative of treating him as a trespasser. The enactment of the various statutes during the year 1920, which are popularly known as the rent laws, has changed this condition. The landlord, except in certain specified cases, cannot remove a monthly tenant at the expiration of his term, and the giving of a notice to remove confers no right to remove the tenant upon the landlord. The landlord, however, is not left without remedy against a tenant who holds over, but under chapter 944 of the Laws of 1920 he may recover a fair and reasonable rent for the premises while in the possession of the tenant. There can be no question but that this statute applies to monthly tenants as well as tenants holding upon other conditions, and it would be unreasonable to hold that the legislature intended that

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before bringing an action against a monthly tenant whose term has expired, the landlord must serve upon the tenant a notice stating that "unless the tenant removes from said premises on the day on which his term expires, the landlord will commence summary proceedings under the statute to remove such tenant therefrom," when the legislature itself has expressly declared that for a limited period the landlord shall have no right to commence such summary proceedings.

It follows that the judgment must be reversed, with ten dollars costs, and a new trial ordered.

MULLAN and BURR, JJ., concur.

Judgment reversed, with ten dollars costs, and new trial ordered.

B. & S. REALTY CORPORATION, Landlord, Respondent, v. JOSEPH WALD, Tenant, Appellant.

(Supreme Court, Appellate Term, First Department, February Term — filed April, 1921.)

Summary proceedings — when tenant not debarred from pleading defense that rent is unreasonable — Laws of 1920, chaps. 944, 945.

While the payment of the first month's rent of premises in the city of New York, several months after the lease was made, constitutes a ratification thereof which prevents the tenant from claiming that he executed the lease under duress, he is not, in a summary proceeding for non-payment of rent, debarred from pleading under the statute (Laws of 1920, chaps. 944, 945) the defense that the rent demanded is unreasonable and oppressive.

By pleading such defense the tenant neither disaffirms his contract nor is he obliged to relinquish the benefits received thereunder, and a failure to claim the right granted to him by the statute, to continue in possession of the premises upon the payment of a reasonable rent, is not waived by his failure to avail himself of such right at the first opportunity.

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APPEAL by the tenant from an order of the Municipal Court of the city of New York, borough of Manhattan, seventh district, entered in favor of the landlord.

Nelson Ruttenberg, for appellant.

Henry G. Littau, for respondent.

LEHMAN, J. The landlord has brought summary proceedings against this tenant for non-payment of rent. It appears that the tenant signed a written agreement of lease prior to October first for the rental of certain premises which he was then occupying under a lease which expired on the thirtieth day of September. The tenant paid the first month's rent under the new lease on October first, but interposed as a defense to these proceedings brought on account of the non-payment of the November rental that the rent was unreasonable and oppressive and also alleges that the agreement was obtained under duress. The trial justice has held that the payment of the first month's rent constituted a ratification of his agreement by the tenant and granted a final order in favor of the landlord on this ground.

There is no doubt but that the payment of the first month's rent several months after the agreement was made, constituted a ratification of the contract which would prevent the tenant from claiming he entered into the agreement under duress. No ratification of the contract, however, can debar the tenant from interposing the defense that the rent is unreasonable and oppressive. Under chapters 944 and 945 of the Laws of 1920 the tenant who pleads this defense does not disaffirm his contract nor is he obliged to relinquish the benefits that he has received under the contract, and a failure to claim the right granted to him by the

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statute to continue in possession of the demised premises upon payment of a reasonable rent, is not waived by the tenant's failure to use such right at the first opportunity. A failure on the part of the tenant to claim the benefit of the statute on the first of October could not induce the landlord in any way to change his position to his disadvantage, and, therefore, creates no estoppel against the tenant, and though such failure may be considered by court or jury as some evidence that in fact the agreement was not oppressive if the tenant thereafter makes such claim, it is at most an implied admission on the part of the tenant and can be given no greater effect than an admission made in any other way.

Final order should, therefore, be reversed and a new trial granted, with thirty dollars costs to appellant to abide the event.

Final order reversed and new trial granted, with thirty dollars costs to appellant to abide event.

ELVIRA REALTY CO., INC., Appellant, v. HERBERT BRACEGIRDLE et al., Respondents.

(Supreme Court, Appellate Term, First Department, February Term — filed April, 1921.)

Landlord and tenant — apartment houses — different rentals for similar apartments in same building — a tenant is not entitled to a reduction in his rent below the reasonable value of his apartment because other tenants voluntarily pay sufficiently high rents to produce a fair return upon the whole property — a landlord still has the right to accept from a tenant, willing to pay, the rent demanded.

Notwithstanding the recent legislative enactments, a landlord still has the right to accept from a tenant, who is willing to pay, the rent demanded for premises in the city of New York.

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The landlord of an apartment house in the city of New York may reasonably, in proper circumstances, enter into agreements of lease with various tenants at different rentals for similar apartments in the same house, and all the leases are enforceable unless any particular tenant can show that he is actually injured by the landlord's use of his property, and has been compelled to enter into a lease which by the terms thereof is oppressive and unreasonable, and the mere fact that the landlord is receiving from certain of the tenants a rent sufficiently high to afford him an adequate return upon his capital investment, does not entitle the other tenants to a reduction below the amount at which similar apartments in the neighborhood are leased and below the rate which, if generally applied throughout the house, would afford the landlord a fair return on the whole property.

Where such a landlord does not obtain more than a reasonable return upon his investment as a whole but having acted reasonably in fixing the widely varying rents for the various tenants, has compelled no tenant to enter into a lease which is oppressive or unreasonable, the tenant paying the higher rent has suffered no injury for which the legislature has attempted to provide a remedy.

Even though the court might consider the rent reserved in some of the leases unreasonable, only the tenant who pays the same is aggrieved, and no other tenant can compel the landlord to allow him to remain at a lower rental than would otherwise be reasonable, merely because the landlord will obtain a fair return upon his whole investment through the higher rents paid by other tenants.

Where in an action for rent the court upon evidence as to the value and maintenance of plaintiff's apartment house and the rents received therefrom, refuses to permit the landlord to raise the rent of defendants in spite of the fact that the evidence showed that all other tenants in the building are paying the same rent for similar apartments, as the landlord has demanded and seeks to recover of defendants, and that such rental is not higher than the prevailing rate for apartments of the same class in that neighborhood, and there is no evidence from which an inference may be drawn that the rent fixed by the trial justice is fair and reasonable, a judgment in favor of defendant will be reversed and a new trial ordered.

APPEAL by the plaintiff from a judgment of the Municipal Court of the city of New York, borough of

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Manhattan, fourth district, entered in favor of the defendants.

Morris J. Bricker, for appellant.

No appearance for respondents.

LEHMAN, J. In the present case the trial justice has taken testimony as to the value of the apartment house owned by the plaintiff, the expenses of maintaining the apartment house and the rental received therefrom. Based upon this testimony he has decided that the landlord is receiving an adequate return upon its investment and has refused to permit the landlord to raise the rent of these defendants in spite of the fact that the evidence shows that all the other tenants in the building are paying the same rent for similar apartments as the landlord has demanded and seeks to recover from these defendants, and that such rental is not higher than the rate prevailing for apartments of the same class in that neighborhood. Under the law the landlord is entitled to recover a fair and reasonable rent for the premises and there is no evidence in the case from which we can infer that the rent fixed by the trial justice is fair and reasonable. It is evident that the landlord could rent these premises to other tenants at a higher rate, and if its entire building were rented at the same rate as the trial justice has fixed in this case the landlord would receive no adequate return upon its investment.

The legislature has not forbidden landlords and tenants from making their own agreements but it has merely sought to provide protection to the tenant against demands for rentals which are unreasonable and oppressive. A landlord still has the right if he finds a tenant willing to pay him the rent demanded, to accept the rent which such tenant is willing to pay.

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The mere fact that the landlord is receiving from certain tenants a rent sufficiently high to afford him an adequate return upon his capital investment does not entitle the other tenants in the house to a reduction below the amount at which similar apartments in the same neighborhood are leased and below the rate which, if generally applied throughout the apartment house, would afford the landlord a fair return on the whole property. A landlord may reasonably under proper circumstances enter into agreements of lease with various tenants at different rentals for similar apartments in the same house and all these leases are enforceable in accordance with their terms unless any particular tenant can show that he is actually injured by the landlord's use of his property and has been compelled to enter into a lease which is actually oppressive and unreasonable in its terms. Where a landlord does not obtain more than a reasonable return upon his investment taken as a whole, and has acted reasonably in fixing the rates for the various tenants and in spite of more or less widely varying rates has compelled no tenant to enter into a lease which is actually oppressive or unreasonable, the tenant paying the higher rent has suffered no injury for which the legislature has attempted to provide a remedy, and on the other hand even though some of the leases may be at rates which the court could properly consider unreasonable, only the tenant who pays these rates is aggrieved thereby and no other tenant in the same premises can compel the landlord to allow him to remain at a lower rental than would otherwise be reasonable merely because the landlord will obtain a fair return upon his whole investment through the higher rates paid by other tenants. The landlord is not compelled to allow any tenant to remain in the premises unless such tenant is ready to pay the land-

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lord either the rental which he has agreed to pay or a rental which is reasonable, and no rental can be considered as reasonable which is less than the amount which would be fixed by ordinary competition and in addition is less than would afford the landlord a fair return upon his investment if applied to all the apartments in the same house.

Judgment should, therefore, be reversed, with ten dollars costs, and a new trial ordered, with costs to appellant to abide the event.

MULLAN and BURR, JJ., concur.

Judgment reversed, with ten dollars costs, and new trial ordered, with costs to appellants to abide event.

EDGAR A. LEVY, Landlord, Appellant, *v.* DAVID B. BAUM, Tenant, Respondent.

(Supreme Court, Appellate Term, First Department; February Term — filed April, 1921.)

Municipal Court of the city of New York — summary proceedings — when order should be made before justice before whom proceedings were instituted — statutes — Laws of 1920, chap. 942 — final warrant in "pending proceedings" can only issue upon additional proof.

Orderly practice requires that a motion to dismiss the petition in summary proceedings in the Municipal Court of the city of New York against a tenant as a holdover, should be made before the justice before whom the proceeding was instituted.

The provision of chapter 942 of the Laws of 1920, in effect September 27, 1920, that no proceeding under section 2231(1) of the Code of Civil Procedure "shall be maintainable" except under certain circumstances therein specified, was not intended to be retroactive in the sense that it should apply to pending proceedings.

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Nothing in said statute of 1920 indicates that the legislature intended that the provision in regard to pending proceedings should apply only to those in which a final judgment had already been entered.

While, therefore, pending proceedings properly initiated and sustained by proof sufficient to entitle the landlord to a final warrant under the law as it existed at the time of the trial, may proceed to the entry of the final order of removal, the final warrant may not issue except upon additional proof.

Upon the hearing in a summary proceeding against a tenant as a holdover after the expiration of his term, the landlord consented to give a lease for one year from October 1, 1920, to each of the tenants in the building, at such rental as the court should determine was reasonable, and, on the theory that a final order was directed for the landlord, the testimony was confined to matters relevant to the tenant's application for a stay pursuant to chapter 137 of the Laws of 1920. The trial justice, upon final submission of the case, and two days after chapter 942 of the Laws of 1920 went into effect, handed down an opinion in which he found that the landlord was entitled to a rental from the tenant herein in a certain sum per year. *Held*, that although the petition did not allege the facts necessary to bring the landlord within the exceptions mentioned in said chapter 942, the court was without legal power to enter an order dismissing the proceedings, and the order will be reversed and the motion to dismiss denied, with costs of the motion.

APPEAL by the landlord from an order of the Municipal Court of the city of New York, ninth district, granting the tenant's motion to dismiss the petition of the landlord in summary proceedings.

M. S. & I. S. Isaacs (Stanley M. Isaacs, of counsel), for appellant.

Phillips, Mahoney & Leibel (Jeremiah T. Mahoney, of counsel), for respondent.

LEHMAN, J. The landlord instituted proceedings against the tenant on the ground that the tenant was holding over after the expiration of his term. The

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precept was returnable on the 8th day of September, 1920. The hearing was adjourned till September 15, 1920, and on that day this tenant and other tenants against whom similar proceedings were brought by the same landlord consented in open court that all questions should be eliminated except the question of what was a reasonable rent for the several tenants to pay, and the landlord consented to give a lease for one year from October 1, 1920, to each of the said tenants, at such rental as the court should determine was reasonable. The trial judge thereupon declared that he would take testimony on the theory that a final order was directed for the landlord confining the testimony to matters relevant to the tenant's application for a stay, pursuant to chapter 137 of the Laws of 1920. The case was finally submitted to the court upon all the evidence, and on or about September twenty-ninth the trial judge handed down an opinion in which he found that the landlord was entitled to a rental from this tenant of $1,440 per year. On September 27, 1920, the legislature enacted chapter 942 of the Laws of 1920, which went into effect immediately, and which provided that no proceeding under subdivision 1 of section 2231 of the Code of Civil Procedure "shall be maintainable," except under certain circumstances specified therein. The petition in this case does not allege the facts necessary to bring the landlord within these exceptions, and for that reason the tenant on October 8, 1920, obtained an order to show cause why an order should not be made and entered dismissing the landlord's petition, and all proceedings taken by the landlord. This motion was not made returnable before the justice who heard the evidence, and no final order had been entered in accordance with the opinion previously handed down by that justice. Without referring the matter to the trial justice, an order was

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made by the justice before whom the motion was made returnable dismissing these proceedings, and the landlord now appeals from that order.

Obviously orderly practice would have required the justice before whom the motion to dismiss the complaint was made returnable to refer the motion to the justice before whom the proceedings were then pending, but aside from the question of practice involved, the tenant was not entitled to a dismissal of the complaint. There are a number of cases in which the words "maintained" or "maintainable" as used in various statutes have been interpreted by the courts of different states, and in some cases they have arrived at the conclusion that the legislature used these words in the sense of initiate, and in other cases that the legislature used these words in the sense of prosecute to judgment. In the present case, in its final analysis the definition of the word "maintainable" is dependent upon the question of whether the legislature intended this provision of the statute to be retroactive in the sense that it should apply to pending proceedings, and in my opinion the legislature has clearly indicated its contrary intent by making special provision in the same statute for such pending proceedings.

In the final section of chapter 942 of the Laws of 1920, the legislature has provided that: "In a pending proceeding for the recovery of real property in such a city on the ground that the occupant holds over after the expiration of his term, a warrant shall not be issued unless the petitioner establishes to the satisfaction of the court that the proceeding is one mentioned in the exceptions enumerated in this subdivision." If the legislature had intended that all proceedings then pending must be dismissed if the petitioner fails to allege sufficient facts to show that the

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proceeding is one mentioned in the exceptions enumerated in that subdivision, or if the evidence produced at the trial prior to the enactment of the statute fails to show such facts, then obviously it was unnecessary to make any special provision in regard to the issuance of the warrant in pending proceedings. There is nothing in the statute to indicate that the legislature intended the provision in regard to pending proceedings to apply only to proceedings in which a final judgment had already been entered, and to place such construction upon the statute would be entirely unreasonable. The petition of the landlord in this case alleges all the facts necessary to obtain a final order under the law as it existed at the time the petition was made, and at the trial the tenant in effect admitted all the facts alleged in the petition. The legislature has made no provision whereby the landlord could amend his petition or furnish the additional proof necessary to bring the proceeding within one of the exceptions enumerated in the statute, except that it has provided that no warrant shall be issued until after such facts have been proven to the satisfaction of the court. The legislature therefore evidently intended that pending proceedings properly initiated and sustained by proof sufficient to entitle the landlord to a final warrant under the law as it existed at the time of the trial, should proceed till the entry of the final order, but that a warrant should not be issued upon such final order except upon additional proof. The court, therefore, had no power to enter an order dismissing such proceedings. In reaching this decision we have not considered the question of whether the final order so entered can result in any practical advantage to the landlord at the present time, or whether such final order when entered will be *res adjudicata* in subsequent proceedings brought by

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the landlord, for regardless of such considerations the landlord has an absolute right under the statute to prosecute the proceedings to final judgment.

Order is, therefore, reversed, with ten dollars costs, and the motion to dismiss denied, with ten dollars costs.

Order reversed, with ten dollars costs.

PEOPLE ex rel. PAUL A. LA ROCQUE, Relator, *v.* RICHARD E. ENRIGHT, Police Commissioner of the City of New York, Respondent.

(Supreme Court, New York Special Term, April, 1921.)

Extradition — rendition warrant — a mere conflict of evidence upon a hearing under a writ of habeas corpus will not warrant the reversal of the determination of the governor.

Where a person held under a rendition warrant issued by the governor of this state upon the requisition of the governor of a sister state sues out a writ of habeas corpus, the issue of fact whether the accused was in the demanding state at the time of the commission of the crime charged against him, is not to be determined according to the ordinary preponderance of evidence, and a reversal of the determination of the governor of this state, regularly arrived at, is not warranted because of a mere conflict of evidence upon that issue.

The identity of the prisoner, the fact that the charge of his having deserted his wife was a crime and that the extradition proceedings were regular and legally sufficient, were conceded. The wife of relator testified as to his presence in the demanding state on the particular date laid in the indictment, and the same fact was affirmed in affidavits accompanying the requisition. In addition to his own testimony, to the contrary, relator produced two witnesses, mere casual acquaintances, who testified to relator's continued presence in another state during the week covering the date stated in the indictment. *Held,* that the writ should be dismissed and relator remanded to custody.

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HABEAS CORPUS proceedings.

Harry E. Shirk, for relator.

Edward Swann, district attorney (Felix C. Benvenga, of counsel), for respondent.

BIJUR, J. Relator having been taken into custody under a rendition warrant issued by the governor of this state upon the requisition of the governor of Virginia has sued out a writ of habeas corpus. He makes no claim that the proceedings are not regular on their face or that the governor of the state of New York was without jurisdiction to issue the warrant, but urges before me only that he is not a fugitive from justice within the meaning of the federal Constitution and United States Revised Statutes, section 5278, because, as he claims, he was not in the state of Virginia on the particular date laid in the indictment, namely, July 13, 1920, on which date he is charged with having deserted his wife. He has undertaken to prove by his own testimony and that of two disinterested witnesses that during the week of July thirteenth he was continuously present in Atlantic City, N. J. His wife, on the other hand, has testified that she talked with him in Norfolk, Va., on that day. It is now urged by relator that the weight of evidence was strongly in his favor and that the writ should be sustained.

The learned district attorney, on the other hand, urges, *first*, that the writ of habeas corpus by its very nature is directed solely to the question whether relator is held by lawful authority, namely, whether the governor had jurisdiction to grant the warrant, and *second*, that if the testimony is to be considered at all, the writ should be dismissed for there was merely the ordinary conflict of evidence before me.

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As to the first point, there is no doubt that a writ of habeas corpus cannot be made to perform the function of a writ of error. *Matter of Gregory*, 219 U. S. 210, 213. Its function is to determine "whether the person restrained of his liberty is detained without authority of law." *Harlan* v. *McGourin*, 218 U. S. 442, 445, 446. It is directed to the inquiry whether the court, magistrate or other person upon whose mandate the relator is detained "had jurisdiction of the defendant and of the offense" (*People ex rel. Scharff* v. *Frost*, 198 N. Y. 110, 115); "whether the magistrate * * * had jurisdiction of the offense of the relator and to impose the sentence." *People ex rel. Smith* v. *Van De Carr*, 86 App. Div. 9, 12. It authorizes the inquiry whether "there be some testimony * * * to support the accusation." *Harlan* v. *McGourin, supra; People ex rel. Gill* v. *Warden*, 208 N. Y. 590. See, also, *Frank* v. *Mangum*, 237 U. S. 309, 331; *Williams* v. *Walsh*, 222 id. 415, 422; *Glasgow* v. *Moyer*, 225 id. 420, 428, 429.

As applied to the instant case it is contended by the respondent that my inquiry should be limited to the question whether apart from the regularity of the proceedings generally, which is conceded, there was any evidence before the governor to warrant his conclusion that relator was in Virginia on July 13, 1920. Relator's counsel, however, claims that upon authority of *People ex rel. Genna* v. *McLaughlin*, 145 App. Div. 513, I should decide this issue of fact according to the ordinary rule of the weight of evidence.

In the *Genna* case it appears, at page 515, that the learned judge at Special Term had said: "As a matter of evidence the weight appears to be with the relator; in fact I am convinced that he was not in Illinois at the time the crime is said to have been committed, and that we are in the presence of a case where the

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proof of an alibi is complete and satisfactory." It is to be noted that two points were made by relator in that case — *first*, that he was not the person named in the indictment, and, *second*, that he was not in Illinois at the time of the commission of the crime. As to the first point, it has, so far as I know, never been questioned but that a mistake in identity is a proper subject for the consideration of the court on habeas corpus both by virtue of our statute (Code Crim. Pro. § 827, subd. 2) and generally as matter of law. That question also is one on which the governor of the state of refuge cannot possibly have made any decision, since the identity of the person charged with a crime cannot well be questioned until some one has been taken into custody upon the governor's warrant. It seems to me, therefore, that, apart from any other consideration, the *Genna* case was one in which the proofs demonstrated that the relator was not the person charged with the crime. The learned Appellate Division was, however, of opinion that the Special Term had erred in following *People ex rel. Ryan* v. *Conlin*, 15 Misc. Rep. 303, in which Mr. Justice Beekman sustained the contention now made before me by the learned district attorney. The Appellate Division reviewed a number of cases in the Supreme Court of the United States which intimate plainly that the warrant of the governor is not subject to review on habeas corpus provided there was any evidence before him to sustain a finding that the relator was in the demanding state at the time of the commission of the crime. It also conceded that at least two decisions of the highest state court, namely, *Dennison* v. *Christian*, 72 Neb. 703; affd., 196 U. S. 637, and *Farrell* v. *Hawley*, 78 Conn. 150, had apparently also held to the same effect. It drew the conclusion, however, that the latest decision (at that

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time) of the Federal Supreme Court, namely, *McNichols* v. *Pease*, 207 U. S. 100, was authority for the proposition that the question whether the relator was present in the demanding state at the time of the commission of the crime was not "subject to any other rule as to its proof (on habeas corpus) than that which controls the determination of all other questions of fact at common law. * * * The true rule should be that this question of jurisdictional fact must be determined by the court as in any other question of fact which it has the power and duty to determine, according to the rule of the common law as to the preponderance of evidence." The order dismissing the writ was therefore reversed and the matter remitted to Special Term for a determination of the question. Since the decision in the *Gemma case*, however, there have been two decisions of the Federal Supreme Court which substantially relate its position that the issue of fact whether the accused was in the demanding state at the time of the commission of the crime is not to be determined in the same way as any other question of fact according to the ordinary preponderance of evidence. To appreciate the significance of these two cases a review of the earlier ones is necessary.

In the case most frequently cited (*People ex rel. Corkran* v. *Hyatt*, 172 N. Y. 176; affd., *sub nom. Hyatt* v. *Corkran*, 188 U. S. 691) the only question actually presented was whether the "constructive presence" of the accused in the demanding state at the time of the alleged commission of the crime was sufficient to warrant his being regarded as a "fugitive from justice." This question of law was decided in favor of the accused upon a formal concession of the actual facts and circumstances of his absence from the demanding state on the various dates involved. The Federal Supreme Court concludes its opinion with the

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words: "We are of opinion that, as the relator showed *without contradiction and upon conceded facts* that he was not within the state of Tennessee at the times stated in the indictments * * * he was not a fugitive from justice within the meaning of the Federal statute upon that subject * * *." The significance of the *Hyatt* case in respect of the point which I am now discussing is expressed by Mr. Justice Peckham (who wrote the *Hyatt* opinion) in *Munsey* v. *Clough*; 196 U. S. 364, 374: "*When it is conceded or when it is so conclusively proved,* that no question can be made that the person was not within the demanding State when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at that time in the demanding State, then the court will discharge the defendant. *Hyatt* v. *Corkran,* 188 U. S. 691, affirming the judgment of the New York Court of Appeals, 172 N. Y. 176. *But the court will not discharge a defendant* arrested under the governor's warrant *where there is merely contradictory evidence* on the subject of presence in or absence from the State, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused."

In *Ex Parte Reggel,* 114 U. S. 642, the court had said at pages 652, 653, that although the only testimony before the governor of the state of refuge was an affidavit made in the court of the demanding state where the prosecution was pending that Reggel was "a fugitive from justice," that statement was not one merely of a legal conclusion, but that the governor was justified in regarding it as a statement of fact "and as sufficient evidence that appellant had fled from the State in which he stood charged, * * *. *If the determination of that fact by the governor of Utah * * * is subject to judicial review, upon*

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habeas corpus, the accused, in custody, under his warrant * * * *should not be discharged merely because, in the judgment of the court, the evidence as to his being a fugitive from justice was not as full* as properly might have been required, or because it was so meagre as, perhaps, to admit of a conclusion different from that reached by him."

In *Roberts* v. *Reilly*, 116 U. S. 80, 95, it is said that "It must appear, therefore, to the governor of the State * * * *first*, that the person demanded is substantially charged with a crime * * *; and, *second*, that the person demanded is a fugitive from the justice of the State the executive authority of which makes the demand. The first * * * is a question of law * * *. The second is a question of fact, which the governor of the State must decide upon such evidence as he may deem satisfactory. *How far his decision may be reviewed judicially in proceedings in habeas corpus, or whether it is not conclusive are questions not settled* by harmonious judicial decisions nor by any authoritative judgment of this court."

In *McNichols* v. *Pease*, 207 U. S. 100, the court said, at page 112: "When a person is held in custody as a fugitive from justice under an extradition warrant, in proper form, and showing upon its face all that is required by law to be shown as a prerequisite to its being issued, he should not be discharged from custody unless it is made *clearly and satisfactorily* to appear that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States." This follows the statement on page 109 that "One arrested and held as a fugitive from justice is entitled of right, upon habeas corpus, to question the lawfulness of his arrest and imprisonment, showing by *competent* evidence * * * that he was not * * * a fugitive from the justice of the demand-

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ing State, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant."

McNichols v. *Pease, supra,* was decided in 1907, the *Genna Case, supra,* in 1911. We have now two later expressions of the opinion of the Federal Supreme Court on this subject. In *Biddinger* v. *Commissioner of Police,* 245 U. S. 128, decided in 1917, Mr. Justice Clarke writes (at pp. 134, 135): "The scope and limits of the hearing on *habeas corpus* in such cases has not been, perhaps it should not be, determined with precision. Doubt as to the jurisdiction of the courts to review at all the executive conclusion that the person accused is a fugitive from justice has more than once been stated in the decisions of this court, *Ex parte Reggel,* 114 U. S. 642; *Roberts* v. *Reilly,* 116 U. S. 80; *Appleyard* v. *Massachusetts,* 203 U. S. 222; but the question not being necessary for the disposition of the cases in which it is touched upon, as it is not in this, it is left undecided. This much, however, the decisions of this court make clear; that the proceeding is a summary one, to be kept within narrow bounds, not less for the protection of the liberty of the citizen than in the public interest; that when the extradition papers required by the statute are in the proper form the only evidence sanctioned by this court as admissible on such a hearing is such as *tends* to prove that the accused was not in the demanding State at the time the crime is alleged to have been committed; and, frequently and emphatically, that defenses cannot be entertained on such a hearing, but must be referred for investigation to the trial of the case in the courts of the demanding State."

Again, in *Hogan* v. *O'Neill,* 255 U. S. 52, the court (by Mr. Justice Pitney) says: "Whether in fact he (relator) was a fugitive from justice was for the deter-

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mination of the Governor of New Jersey * * * this conclusion must stand unless *clearly* overthrown, which appellant has not succeeded in doing."

It will be observed that, although these extracts express the doubt of the court as to the precise scope and limits of the writ of habeas corpus in the premises, they indicate when interpreted in the light of the previous decisions a doubt only whether the determination of the governor may be reviewed at all, but no doubt as to the repeated declaration of the court that a mere conflict of evidence on habeas corpus will not warrant a reversal of the governor's determination regularly arrived at. The Supreme Court has been manifestly unwilling to declare that under no possible circumstances should the evidence taken before the governor be reviewed. Without considering other reasons, it is plain that our highest judicial tribunal would be unwilling to take an uncompromising position in that respect when we consider that governors of states are not necessarily — indeed are rarely — men trained in the law and that the court may well desire to reserve the right to apply in an appropriate case to the decision of the governor the rule of the municipal law that mere *scintilla* of evidence is no evidence. *Matter of Case,* 214 N. Y. 199.

On the other hand, the only evidence, to quote the language of Mr. Justice Clarke in the *Biddinger* case, "sanctioned" by the court as admissible on habeas corpus is such as tends to prove the absence of the accused at the time of the commission of the crime *as opposed to evidence tending to establish his innocence.* This declaration, however, is plainly not intended to detract from the immediately preceding statements in the same opinion concerning the doubt as to the propriety of any review of the executive conclusion, and particularly it does not attempt to

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modify the earlier characterization of the necessary nature of such evidence effective, namely, as "admissions," "conclusive" evidence, "clear and satisfactory" evidence, and "competent" evidence. I certainly cannot indulge the view that these phrases are merely casual and were employed inadvertently. They are repeated in form or substance so frequently as to import mature deliberation and therefore to be entitled to be accorded appropriate significance.

In this connection I recall what was aptly said by McKenna, then District Judge, in *Bowdoin College* v. *Merritt*, 63 Fed. Repr. 213, 214, under similar circumstances. In answer to a suggestion that the Supreme Court may have overlooked the question of jurisdiction in *Detroit* v. *Dean*, 106 U. S. 537, he wrote: "But I do not think it reasonable to assume that the point *would have escaped the vigilance and ability of the court* and counsel in a case where jurisdiction was contested."

In addition to the established general rule which limits the inquiry on habeas corpus to the question of jurisdiction, there are other considerations in matters of interstate rendition which emphasize the wisdom of holding substantially to this limitation. Thus it is said in the *Biddinger Case, supra*, at page 133, that the provisions relating to interstate rendition "have not been construed narrowly and technically by the courts as if they were penal laws, but liberally to effect their important purpose. * * * Courts have been free to give this meaning to the Constitution and statutes because in delivering up an accused person to the authorities of a sister State they are not sending him for trial to an alien jurisdiction, * * * with laws which our standards might condemn, but are simply returning him to be tried still under the protection of the Federal Constitution, but in the manner

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provided by the State against the laws of which it is charged that he has offended."

It is significant, too, that in no one of the leading cases was the accused discharged, except in *Hyatt* v. *Corkran*, in which, as the Supreme Court later said (*Ireland* v. *Woods*, 246 U. S. 323, 329), there was no dispute about the facts.

Although in a number of cases, and particularly in the *Genna Case, supra*, it is suggested that while an alibi of the prisoner as involving his guilt or innocence will not be tried out in habeas corpus, nevertheless, the question whether he was present in the state at the time of the crime should be determined. The nice distinction thus drawn is quite clear as a theory, but as matter of practice we are bound to consider that result would follow from an unqualified and strict application of this rule. While it is true that ordinarily the term alibi is applied to a defense that the accused was not present at the scene of the crime, the same evidentiary effect must necessarily follow, indeed is emphasized, by proof that he was not present even in the state. If the accused be free to litigate on habeas corpus in the usual way this issue, whether it be termed a defense or not, it is clear that the demanding state must necessarily be prepared to meet the issue adequately in order to overcome by preponderance of testimony whatever case the accused may be able to make in that respect. Since, however, the demanding state cannot know in advance what testimony will be tendered on behalf of the accused, no course would be safe other than preparation to present all the affirmative proof touching the presence of the accused at the scene of the crime. In a very large proportion of the cases surely this would mean that the demanding state, however distant from the state of refuge, must practically be prepared to try

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its entire case on habeas corpus in order to secure the opportunity to try it again in the criminal proceedings.

In my opinion, therefore, in the instant case the identity of the prisoner, the fact that the charge laid against him is a crime, and the regularity and legal sufficiency of the proceedings before the governor being conceded, a decision by me of the question whether relator was present in Virginia on the date laid in the indictment must at least be controlled by the qualification placed upon the evidence by the Federal Supreme Court. I find that it does not meet this test.

Relator's wife testified that he was present in Norfolk, Va., on July 13, 1920. Affidavits accompanying the requisition were put in evidence in which two parties affirmed the same fact. In addition to the contrary testimony of the relator, he produced two witnesses who testified to his *continuous* presence in Atlantic City during the week covering the date laid in the indictment. In view of the fact that it manifestly was of no possible importance to these two witnesses — mere casual acquaintances — that relator should have been present every day and throughout the whole of each day in Atlantic City, I am unable to yield complete reliance to the accuracy of their recollection on that subject, as it relates to what was to them a mere passing incident occurring over two years ago. Nor can I be oblivious to the fact that although relator testified that he had abandoned Norfolk, Virginia, as his home more than a year and a quarter before the date of the alleged desertion, he registered at the hotel in Atlantic City on the occasion in question as from "Norfolk, Virginia."

Finally, were it necessary, I might advert to the fact that the nature of the crime charged, namely,

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desertion, is such that the exact date charged in the indictment would not necessarily be controlling. *Rinne* v. *Gerber*, 111 Minn. 132; *Strassheim* v. *Daily*, 221 U. S. 280, and generally *Matter of Hoffstot*, 180 Fed. Repr. 240; 218 U. S. 665.

Writ dismissed and relator remanded to custody.

FRANK LAVEITES, Plaintiff, *v.* LOUIS GOTTLIEB, ALEXANDER HOODACK and HYMAN GOLD, Defendants.

(Supreme Court, Kings Special Term (Trials), April, 1921.)

Pleading — breach of covenant — when covenant of quiet enjoyment not dependent upon payment of rent.

A breach of covenant based upon the personal acts of the covenantor is sufficiently alleged by negativing the covenant.

Where an allegation of the complaint in an action of covenant, that in the lease, which is neither set forth nor a copy attached, defendants covenanted that plaintiff should peaceably and quietly occupy the premises, is followed by allegations that plaintiff has not been permitted peaceably to occupy and enjoy the possession of the premises, but on the contrary after the commencement of the term and on dates stated "the defendants unlawfully and without authority in law and with force, entered upon the same and ejected this plaintiff therefrom and have ever since kept him out of possession," but there is nothing to show that defendants' covenant for quiet enjoyment was dependent upon plaintiff's payment of rent, the complaint is good on demurrer, though it fails to allege that plaintiff had paid the rent called for by the lease.

If the covenant to pay rent was not a condition precedent the covenant for quiet enjoyment was independent, and the failure of the plaintiff to live up to his obligation, is no answer to an action for defendants' breach of their covenant.

DEMURRER to complaint.

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Effingham L. Hollywell, for plaintiff.

Henry I. Perlin (Felix M. Rosenstock and Harris B. Rotkowitz, of counsel), for defendants.

CROPSEY, J. The sufficiency of the complaint is challenged by demurrer. The action is one of covenant. The complaint alleges the making of a lease by which the plaintiff hired from the defendants certain premises for a specified time at stated rentals, and it alleges that in the lease the defendants covenanted that the plaintiff "should peaceably and quietly occupy and enjoy the premises aforesaid." Then follow the allegations that plaintiff has not been permitted peaceably to occupy and enjoy the possession of the premises, but on the contrary after the commencement of the term and on the dates stated "the defendants unlawfully and without authority in law and with force, entered upon the same and ejected this plaintiff therefrom and have ever since kept him out of possession." By these acts the plaintiff alleges he was damaged.

An action of covenant lies against the covenator himself, based upon his own acts. *Sedgwick* v. *Hollenback*, 7 Johns. 376, 380. And the breach being by the covenantor is sufficiently alleged by negativing the covenant. Rawle Cov. § 155; *Abbott* v. *Allen*, 14 Johns. 248, 252; *Woolley* v. *Newcombe*, 87 N. Y. 605; *Brown* v. *Stebbins*, 4 Hill, 154.

The remaining question is whether the complaint is good without an allegation of performance by the plaintiff of the terms of the lease, that is, of the payment of the rent called for. The complaint contains no such allegation. Whether the plaintiff must allege and prove performance of his part of the agreement depends upon whether the defendants' covenant is

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independent of the plaintiff's, or is dependent upon it. And this question is to be determined and controlled by the intent of the parties. *Rosenthal Paper Co.* v. *National Folding Box & Paper Co.*, 226 N. Y. 313, 320. The complaint does not set forth the lease nor is a copy of it attached. The substance of the allegations is set forth above. From the complaint it is impossible to tell what the intent of the parties was. There is nothing to show that the defendants' covenant of quiet enjoyment was dependent upon the plaintiff's payment of rent. And upon demurrer the presumption favors the sufficiency of the pleading attacked. Generally covenants are to be treated as independent rather than as in the nature of conditions precedent. Jones Landl. & Ten. § 233; McAdam Landl. & Ten. (4th ed.) § 122; 7 Wait Act. & Def. 354; *Pratt* v. *Gulick*, 13 Barb. 297, 300. If the plaintiff's covenant is not a condition precedent, the defendants' covenant is independent and the failure of the plaintiff to live up to his obligation is no answer to an action brought for a violation by the defendants of their covenant.

Such cases as have been called to the court's attention, or have been found by the court, support the holding that the payment of rent is not a condition precedent to the tenant's right to enforce the covenant of quiet enjoyment unless that is shown to be the plain intent of the parties and so performance by the tenant need not be pleaded. *Spencer* v. *Commercial Co.*, 30 Wash. 520; *Dawson* v. *Dyer*, 5 Barn. & Adol. 584; *Briant* v. *Pilcher*, 16 Com. B. (O. S.) 354; 3 Bates Pl., Pr., Part. & Forms, 1975.

Even if the lease contains a clause giving the landlord the right to re-enter upon non-payment of the rent, that does not mean he can do so by using force, for even under such a clause he cannot take the law into his own hands. Such a clause would give him the

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right to re-enter provided he could do so without using force, or would give him the right to take action to recover possession. *Spencer* v. *Commercial Co.*, 30 Wash. 520, 525, *et seq.*; *Michaels* v. *Fishel*, 169 N. Y. 381, 389; *Cohen* v. *Carpenter*, 128 App. Div. 862; *Hoske* v. *Gentzlinger*, 87 Hun, 3. Forcible entry upon real property is prohibited by statute. Section 2233 of the Code of Civil Procedure provides: "An entry shall not be made into real property, but in a case where entry is given by law; and, in such a case, only in a peaceable manner, not with strong hand, nor with multitude of people. * * *" And such an entry by force, except in the cases and manner allowed by law, is a misdemeanor. Penal Law, § 2034.

In the cases cited by defendant (*Meyer* v. *Schulte*, 160 App. Div. 236, and *Baitzel* v. *Rhinelander*, 179 id. 735) the court found as a fact that the covenant of quiet enjoyment was dependent upon the performance by the tenant of his covenant to pay rent and so of course held that it was necessary for the tenant to plead and prove performance on his part in order to hold the landlord for the violation of his covenant.

Demurrer overruled, with ten dollars costs.

MAX LEWIS, Plaintiff, *v.* FRANK BOLLINGER and Others, Defendants.

(Supreme Court, Kings Special Term (Trials), April, 1921.)

Option for sale of real estate — when assignable — lease — consideration — Personal Property Law, § 41 — Code Civ. Pro. § 840.

Though an option for the sale of real property, until accepted, is not a contract for its sale, the option is assignable under

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section 41 of the Personal Property Law unless the parties by mutual agreement otherwise provide.

The fact that the option was contained in a lease constitutes a good consideration for it, and, where a modification of the option reducing the purchase price and reciting that it was made in consideration of the original lease and the sum of one dollar, is under seal, a consideration, under section 840 of the Code of Civil Procedure, is presumed.

DEMURRER to complaint.

Katsky & Bernstein, for plaintiff.

Lewis C. Grover and A. Lloyd Lott, for defendants.

CROPSEY, J. Mary E. Bollinger made a written lease of real property to John J. Bollinger. The lease contained the provision that the landlord would sell the premises to the tenant at any time during the term for the sum of $14,000. It also provided "that the covenants and agreements contained in the within lease are binding on the parties hereto and their legal representatives." Later, the same parties executed a supplemental agreement modifying the option by providing that the tenant might purchase for $12,000 instead of $14,000. John J. Bollinger assigned the lease and his rights under the option, and there were subsequent assignments thereof. Finally, the rights under the lease, including the option, were held by Herbert Kiowsky and Louis Lewis. These individuals then assigned their rights to the option to the plaintiff. During the life of the option the plaintiff duly accepted it. The defendants are the heirs at law of Mary E. Bollinger and they refuse to convey the property. This suit is for specific performance or, in the alternative, for damages. All the defendants demur, challenging the sufficiency of the complaint. By

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stipulation the allegations of damage are eliminated from the complaint and the decision upon this demurrer is to be without costs.

The question thus presented is whether the assignee of the rights of the holder of an option for the sale of real estate who has accepted the option in time can compel specific performance by the optionor. And if such a right exists, the secondary question arises whether it can be enforced upon the facts alleged in this complaint.

Whatever contention may be made concerning the logic of the decisions, it seems to be well settled in this state that the assignee of a vendee of a contract for the sale of real property cannot merely under his assignment compel specific performance by the vendor. *Hugel* v. *Habel*, 132 App. Div. 327; *Dittenfass* v. *Horsley*, 177 id. 143; affd., 224 N. Y. 560; *Wadick* v. *Mace*, 191 id. 1; *Ide* v. *Brown*, 178 id. 26, 39; *Schuyler* v. *Kirk-Brown Realty Co.*, 193 App. Div. 269. The reason asserted for these decisions is that there is no mutuality of obligation and remedy and that the vendor could not compel the assignee of the vendee to take title and hence the vendor cannot be compelled at the instance of such assignee to give title. But these decisions are not applicable to a situation such as exists in the case at bar.

An option for the sale of real property until accepted is not a contract for its sale. It is merely an offer to sell and an agreement to hold the offer open for a given time. It gives the optionee the right to buy within the fixed time, but unless he accepts the offer he is under no obligation. If the offer is accepted, then, for the first time, there exists a contract for the sale of the property. The offer of the seller having been accepted, there is then an enforceable agreement. And the optionee can require the

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owner to specifically perform. *Carney* v. *Pendleton*, 139 App. Div. 152; *Jones* v. *Barnes*, 105 id. 287; *Spitzli* v. *Guth*, 112 Misc. Rep. 630; *Benedict* v. *Pincus*, 191 N. Y. 377, 382.

May the rights under such an option be assigned? Whatever may have been the ancient rule, it is and for many years has been the statute law of this state that "Any claim or demand can be transferred" except in certain specified cases. Pers. Prop. Law, § 41. And the exceptions to this rule do not apply to the right under an option. The exceptions are to claims for personal injury, or breach of promise to marry, or those founded upon a grant made void by statute, or where such transfer has been expressly forbidden by statute of the state or of the United States, or would contravene public policy. Of course the parties may always by mutual agreement provide that a claim shall not be transferred. And so the courts have held contracts for personal employment and those indicating that the personal responsibility of the contracting party was relied upon not to be assignable. In such cases it is held that the nature of the contract shows that it was the intention of the parties that it should not be assigned, although it contained no express provision prohibiting it. *New York Bank Note Co.* v. *Hamilton Bank Note Eng. & Ptg. Co.*, 180 N. Y. 280, 292; *Arkansas Smelting Co.* v. *Belden Co.*, 127 U. S. 379, 387; *Delaware County* v. *Diebold Safe Co.*, 133 id. 473, 488. Even where the contract contained a clause that it should "inure to the benefit of and bind the respective parties thereto, their personal representatives, successors and assigns," it has been held not to be transferable because of other provisions showing that that was the intention of the parties. *Nassau Hotel Co.* v. *Barnett & Barse Corp.*, 162 App. Div. 381. The question is

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one of intention of the parties and if the contract does not show that it was not to be assignable and it is one that does not come within the exceptions mentioned in the Personal Property Law, the right to assign it is absolute. As one of the cases says: "Assignability is the rule, non-assignability the exception." And this is so, although the contract does not contain a clause making it binding upon assigns or authorizing its transfer. *Devlin* v. *Mayor*, 63 N. Y. 8, 17; *Smith* v. *Craig*, 211 id. 456, 461; *Rosenthal Paper Co.* v. *National Folding Box & Paper Co.*, 226 id. 313, 325; *Janvey* v. *Loketz*, 122 App. Div. 411.

In the case at bar there is nothing to show that the parties intended that the option should not be assigned. The option is to sell for cash, and the rights under it could have been assigned even had the agreement not so provided. The defendants' contention that the modification of the option, by reducing the purchase price, was restricted solely to acceptance by the optionee, lacks conviction. The modification refers to the lease which contained the original option and in effect is but a modification of that option. It changes only one thing in it, namely, the amount of money necessary to be paid. All other provisions of it remain the same. But as has been already stated, even if the original agreement was not expressly made binding upon the parties' assigns, that would be its legal effect.

The option was contained in a lease and that constitutes a good consideration for it. *Carney* v. *Pendleton*, 139 App. Div. 152; *Bullock* v. *Cutting*, 155 id. 825; *Pearson* v. *Millard*, 150 N. C. 303, 307; *Tilton* v. *Sterling Coal & Coke Co.*, 77 Pac. Repr. 758, 760; *Hayes* v. *O'Brien*, 23 L. R. A. 555, 558. The modification of the option recited it was made in consideration of the original lease and the sum of one dollar, and it is

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under seal. This presumes a consideration. Code Civ. Pro. § 840.

Had the assignment to the plaintiff been made after the option had been accepted, he would be in the same position as the assignee of the ordinary contract of purchase, for the acceptance of the option creates the contract. But the option had not been accepted when the rights under it were secured by the plaintiff. He accepted the option and so he personally became obligated to the vendor. There is no lack of mutuality under these circumstances. The only contract for the sale of the property is the one arising out of the option given by defendants' intestate and the acceptance of that option by the plaintiff. Until such acceptance there was no contract of sale. When the plaintiff accepted the option he was then obligated to buy the property and the defendants could have required him to have specifically performed and to have completed his purchase. He necessarily has the same right. While no case in this state has been called to the court's attention directly on this point, there are numerous ones in other states upholding plaintiff's right to maintain this action. *Winslow* v. *Dundom*, 46 Mont. 71, 79–82; *Simmons* v. *Zimmerman*, 144 Cal. 256, 260; *Kerr* v. *Day*, 14 Penn. St. 112; *Napier* v. *Darlington*, 70 id. 64; *Kreutzer* v. *Lynch*, 122 Wis. 474, 478; *House* v. *Jackson*, 24 Ore. 89; *Blakeman* v. *Miller*, 136 Cal. 138; *Cameron* v. *Shumway*, 149 Mich. 634, 640; *Simms* v. *Lide*, 94 Ga. 553; *Perry* v. *Paschal*, 103 id. 134; *Pearson* v. *Millard*, 150 N. C. 303, 309–311. See, also, note to 43 L. R. A. (N. S.) 115–119. Judgment for plaintiff overruling demurrer.

Judgment accordingly.

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MAX SCHWARTZ, Plaintiff, *v.* MORRIS RAPPAPORT and Others, HAIM S. GOLDBERG, Impleaded, Defendants.

(Supreme Court, Kings Special Term (Trials), April, 1921.)

Action to reform mortgage — priority of mechanics' liens — recording.

The right to have a mortgage containing no description of the real property intended to be covered thereby, reformed in that particular, is subject to the rights under a mechanic's lien filed against the property after the mortgage was recorded.

ACTION to reform a mortgage.

Ginzburg & Picker, for plaintiff.

Joseph W. Gottlieb, for defendant Goldberg.

CROPSEY, J. The question is one of priority between plaintiff's mortgage and defendant's mechanic's lien. The mortgage was made and recorded before the lien was filed, but the mortgage did not describe the property intended to be covered by it, which was the property affected by the defendant's lien. This action is to reform the mortgage by making it cover the property in question, as was originally intended, and then to foreclose it.

In the absence of a statutory provision, the holder of a mechanic's lien has no greater rights than a judgment creditor and his lien is subject to the rights of those holding deeds or mortgages although unrecorded when the mechanic's lien was filed. *Payne* v. *Wilson,* 74 N. Y. 348, 355, *et seq.* But the Lien Law, section 13, provides: "A lien for materials furnished

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or labor performed in the improvement of real property shall have priority over a conveyance, judgment or other claim against such property not recorded, docketed, or filed at the time of the filing of the notice of such lien, except as hereinafter * * * provided; * * *." The plaintiff's mortgage was not recorded, that is, it was not a valid lien against the property covered by the mechanic's lien at the time the latter was filed. Even if the defendant had known of the existence of plaintiff's mortgage, the former's lien would have priority. Plaintiff's mortgage could come ahead of the defendant's lien only if it had been properly recorded against the property affected before the lien was filed. *Lemmer* v. *Morison*, 89 Hun, 277; *Reedy Elevator Co.* v. *Monok Co.*, 171 App. Div. 653.

Plaintiff contends that the case of *Payne* v. *Wilson, supra,* is authority for his contention that his mortgage has priority, and he asserts that case was decided on the statute of 1875, chapter 279, which contains a provision similar to that now in section 13 of the Lien Law. He also suggests that chapter 500, of the Laws of 1863, was involved in that case. All of these claims and suggestions, however, are unfounded. The *Payne* case arose on a lien filed in 1872, before the enactment of the Laws of 1875, and chapter 500 of the Laws of 1863 applied only to the then city of New York, and in the *Payne* case the lien was filed in the county of Kings, which was then not a part of that city. The statute which then applied to mechanics' liens filed in the county of Kings was chapter 478 of the Laws of 1862, but that contained no provision similar to that of the present statute and so the *Payne* case is authority only for the proposition that in the absence of a statute a mechanic's lien does not have priority over an unrecorded deed or mortgage.

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The plaintiff is entitled to reform his mortgage and to foreclose it, but his rights are subject to those of the defendant Goldberg under his mechanic's lien. The defendant Goldberg is entitled to costs.

Ordered accordingly.

MAX FEUER, Plaintiff, *v.* LEOPOLD SCHALLER et al., Defendants.

(Supreme Court, Kings Special Term for Trials, April, 1921.)

Fraudulent conveyances — debtor and creditor — judgments — bona fide purchaser for value — evidence — Real Property Law, § 266 — Code Civ. Pro. § 1251.

Under section 263 of the Real Property Law a conveyance of real property made by a debtor in fraud of creditors prior to the docket of a judgment against him is void, and the lien of the judgment, by virtue of section 1251 of the Code of Civil Procedure, attaches notwithstanding such conveyance.

Where, however, it appears that before plaintiff's judgment had been docketed the fraudulent grantee of the judgment debtor, a brother-in-law, conveyed the property to one who it was conceded paid full value for it, and in an attack upon the last conveyance on the ground that the grantee, who had made payments on account of the purchase price before he had any notice which could possibly be said to charge him with bad faith, and for which in any event he would have a lien on the property, did not take the conveyance in good faith, it appears that the judgment debtor, representing to said grantee that he owned the property, entered into a contract to convey, and, upon a search of the title, the prior conveyance was disclosed, the judgment debtor said that the property was held for him by the grantee therein, who signed the deed to the last grantee, who paid the full consideration to the judgment debtor, the proof is insufficient to establish that the last grantee was not a *bona fide* purchaser in good faith, and he comes within section 266 of the Real Property Law and the conveyance to him is good.

ACTION by judgment creditor to set aside conveyances.

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Nathaniel H. Kramer, for plaintiff.

Isaac Siegmeister, for defendants Schaller and Abramowitz.

Henry D. Levy, for defendant Schafran.

Samuel Silbiger, for defendant Newman.

CROPSEY, J. The conveyance by the judgment-debtor, Leopold Schaller, to his wife was in fraud of his creditors. So it can also be found that the conveyance from Schaller's wife to Abramowitz, a brother-in-law, was fraudulent. If there had been no other conveyance the plaintiff could succeed, for while section 1251 of the Code of Civil Procedure provides that a judgment is a lien on real property "which the judgment debtor has" at the time it is docketed, a conveyance made prior to its docket in fraud of the debtor's creditors is void under section 263 of the Real Property Law and hence the lien of the judgment would attach notwithstanding such conveyance. *White's Bank of Buffalo* v. *Farthing,* 101 N. Y. 344; *Smith* v. *Reid,* 134 id. 568, 577; *MacDonald* v. *MacDonald,* 42 N. Y. St. Repr. 480.

But before plaintiff's judgment was docketed Abramowitz had conveyed the property to Newman, who, it is conceded, paid full value for it. Newman's conveyance is attacked on the ground that he did not take it in good faith. It is conceded that Newman paid moneys on account of the purchase before he had any notice which could possibly be said to charge him with bad faith and so in any event he would have a lien upon the property for the amount so paid. *Elterman* v. *Hyman,* 192 N. Y. 113. The facts estab-

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lished, however, are insufficient to establish that he is not a *bona fide* purchaser in good faith. It has been held that where a purchaser pays full value he is not chargeable with constructive notice that the conveyance to his grantor was fraudulent and that actual notice is required to affect his title. *Stearns* v. *Gage*, 79 N. Y. 102. But the better rule seems to be that it is not necessary to show actual notice of fraud and that it is sufficient if the facts within the purchaser's knowledge are of such a nature as in reason to put him upon inquiry and to excite the suspicion of an ordinarily prudent person, and if he fails to make an investigation he will be charged with the knowledge that a reasonable inquiry as suggested by the facts would have revealed. *Parker* v. *Conner*, 93 N. Y. 118; *Anderson* v. *Blood*, 152 id. 285. Here the established facts were not sufficient to require Newman to make an investigation. Leopold Schaller represented to Newman that he owned the property and he made a contract to sell it to Newman. When Newman's lawyer searched the title he found a conveyance from Schaller to his wife and from Mrs. Schaller to Abramowitz. Thereupon Schaller said that Abramowitz held the property for him and Abramowitz signed a deed to Newman and the consideration was all paid to Schaller. In fact Abramowitz had deeded the property to Schafran prior to that time and that deed had been recorded but Newman's attorney did not discover it. Later Schafran quit claimed to Abramowitz, and thus for the purposes of this case the deed to Schafran is of no concern. There is no evidence to show that Newman knew of plaintiff's judgment, although it was docketed two months before he took title, but it was not docketed until a number of months after Schaller had conveyed to his wife. Nor is there any proof that

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Newman knew that Schaller was in financial difficulties and nothing to put him upon inquiry as to that. Newman was charged with knowledge of the conveyance by Schaller to his wife for a nominal consideration and of the later conveyance by her to Abramowitz, also for a nominal consideration, and the fact that Abramowitz held the property for Schaller; but this did not show that it was in fraud of creditors of any of the persons concerned. And even if Newman knew that Abramowitz was Schaller's brother-in-law the situation would not be different. In the absence of some notice of the fraudulent character of the conveyances Newman was under no obligation to make inquiry. The fact that property claimed to be owned by one person stood in the name of a dummy was insufficient to raise the presumption or even the suggestion that the person for whose benefit it was held was in financial difficulty. It is a common experience that property is so held where there is no fraudulent intent whatsoever. Newman being a purchaser for a valuable consideration and it not appearing "that he had previous notice of the fraudulent intent of his immediate grantor or of the fraud rendering void the title of such grantor" he comes within the provisions of section 266 of the Real Property Law, and his conveyance is good.

Judgment for the defendants, but without costs.

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ALBANY COUNTY SAVINGS BANK, Plaintiff, *v.* FANNIE V. BARTOW, EDWARD H. GOETZ and MARY T. GOETZ, Defendants.

(County Court, Erie County, April, 1921.)

Foreclosure — real estate — lapse of time insufficient reason for refusing to grant an order to put purchaser in possession — Code Civ. Pro. § 1675.

Upon an application for an order under section 1675 of the Code of Civil Procedure to compel the sheriff to put the purchaser at a sale in foreclosure in possession, the court should be guided by the facts in each particular case, and mere lapse of time is not sufficient reason for refusing to grant such an order, and if the court deems it is for the best interests of all concerned, the granting of the order is justified.

The purchaser at a sale in foreclosure, after retaining title to the property for about five years, though it never had been put into actual possession thereof, conveyed it to the present record owner. Upon the return of an order to show cause obtained by the wife of the mortgagor, who was a party to the foreclosure action, why an order granted pursuant to section 1675 of the Code of Civil Procedure directing the sheriff to put the present owner in possession of the property should not be vacated, it appeared that though after the sale in foreclosure a demand for the actual physical possession of the property had been made by the purchaser upon the mortgagor's wife she never surrendered such possession and that during the time she occupied the premises she made no effort to have her dower right established by legal action and did not notify the purchaser in foreclosure that she had any rights in the property. *Held*, that the order to show cause will be vacated and the present owner's motion to continue in force the order granted pursuant to section 1675 of the Code of Civil Procedure granted, with direction to the sheriff to proceed thereunder.

ACTION to foreclose mortgage.

Carlton E. Ladd, for motion.

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Penney, Killeen & Nye (Henry W. Killeen, of counsel), in opposition.

NOONAN, J. For several years prior to January 1, 1916, the defendant Edward H. Goetz was the owner of certain premises on Delaware avenue in the city of Buffalo, upon which there was a mortgage to the Albany County Savings Bank. Mary T. Goetz, the defendant, is the wife of said Edward H. Goetz, but they have been living apart from each other for several years.

Sometime in 1915 an action to foreclose the Albany County Savings Bank mortgage was begun, and both Edward H. Goetz and Mary T. Goetz, his wife, were parties to the action. The foreclosure action was carried through to the finish, and the property covered by the mortgage was sold by a referee, and by a deed given by the said referee, dated January 7, 1916, and recorded in the Erie county clerk's office on January 8, 1916, the property was conveyed to the Borderland Realty Corporation, which retained the title to the same until March 17, 1921, when it conveyed the property to one Hilda W. Chadwick, who is now the record owner of the same and is seeking to obtain possession thereof from Mary T. Goetz, under an order granted by this court pursuant to the provisions of section 1675 of the Code of Civil Procedure.

After the order was granted directing the sheriff to put said Hilda W. Chadwick in possession of the property, Mary T. Goetz applied to the court for an order to show cause why the order putting Hilda W. Chadwick in possession should not be vacated, and the question to be determined by the court is whether or not said Hilda W. Chadwick has the right to the relief which she is seeking, or whether her order should be vacated and set aside.

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We have to approach the solution of the problem without much guidance from reported cases, as I can find none of value construing section 1675 of the Code of Civil Procedure, so far as this case is concerned. The counsel for Mary T. Goetz contends that Hilda W. Chadwick has lost her right to the remedy which she invokes by lapse of time, and that she was also bound to make inquiries concerning the rights of said Mary T. Goetz, who was in possession of the premises. Counsel for said Hilda W. Chadwick contends that she has succeeded to all the rights of the Borderland Realty Corporation, the purchaser of the property in question upon the foreclosure sale. I find no decisions holding that the powers given under section 1675 of the Code have to be exercised within any particular time. I think it will be generally conceded that the right is available without question for the protection of the purchaser at the foreclosure sale, or his lawful assignees, if invoked within a reasonable time after the sale, and so the question is, is the lapse of five years and over since the sale was perfected such a one as will bar the petitioner from the relief asked for?

The affidavits show that sometime after the sale, the exact date not being fixed, a demand for the actual physical possession of the property was made upon Mary T. Goetz by the duly authorized representatives of the Borderland Realty Corporation, but that she never surrendered the actual possession of the property, and that the Borderland Realty Corporation never actually acquired the physical possession of the property.

It is the contention of Mary T. Goetz that the foreclosure of the mortgage upon the property and the transfer of its title to the Borderland Realty Corporation was a subterfuge on the part of her husband,

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Edward H. Goetz, to deprive her of her dower rights in the property, but as I view the case we are not concerned with this problem for she was a party to the foreclosure and had her day in court. It was also intimated that she had an unrecorded deed to the premises from her husband, but the president of the Borderland Realty Corporation makes affidavit that no deed has ever been given by the corporation to the property in question to anyone except Hilda W. Chadwick.

During the time that Mary T. Goetz has occupied the premises she has made no effort to have her rights established through legal action. She had notice that the property was being sold, and was asked by the purchaser about two weeks prior to the granting of the order to vacate the premises on April first, and this she failed to do; neither did she notify the purchaser of any rights.

I think that the court in issuing the order provided for under section 1675 of the Code, should be guided by the facts in each particular case, and that the lapse of time alone is not sufficient reason for refusing to grant such an order. If upon an examination of all the facts in a particular case the court deems it is for the best interests of all concerned that the order should issue, then the court is justified in granting the relief provided by said section.

Since the Borderland Realty Corporation was never put into actual physical possession of the premises, and as the said Hilda W. Chadwick is the successor to all the right, title and interest of said Borderland Realty Corporation, and the said Mary T. Goetz had her day in court before the property was conveyed to the Borderland Realty Corporation, and as she has taken no steps since the said corporation acquired the property to assert any claim that she may have

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therein, I think it will be for the orderly administration of justice and the securing of the rights of the purchaser who has put a considerable sum of her own money into the premises, to continue the order heretofore granted under section 1675 of the Code of Civil Procedure, in force, and the order to show cause why it should not be vacated is hereby itself vacated, without costs, and the sheriff of Erie county is hereby directed to proceed under the order originally granted April 5, 1921.

Ordered accordingly.

Matter of the Estate of WILLIAM H. YAWKEY, Deceased.

(Surrogate's Court, New York County, April, 1921.)

Transfer tax — appraisal — when accrued interest on investments should not be included in valuation — Tax Law, § 221-b.

In fixing under section 221-b of the Tax Law, the additional tax of five per cent on investments left by a decedent who died in May, 1919, it is improper to include in the valuation, the accrued interest on the investments to the date of decedent's death.

The system of transfer tax appraisers in reporting valuations, to include the market value of investments plus interest, is one of convenience only, and cannot be used to sustain a transfer tax under section 221-b of the Tax Law.

APPEAL from an order fixing the transfer tax.

Hughes, Rounds, Schurman & Dwight (Charles E. Hughes, Jr., of counsel), for executors.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for State Comptroller.

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FOLEY, S. The executors appeal from the order fixing the transfer tax on the ground that the tax provided by section 221-b of the Tax Law has been imposed on the accrued interest as well as the principal of the investment. The testator died May 5, 1919. The gross value of the investments left by him is found in the report of the appraiser to be approximately $4,200,000. This valuation includes the accrued interest on these investments to the date of death amounting to $52,422.29. The additional tax of five per cent has been computed on this item of interest.

The material part of section 221-b reads as follows: "Upon every transfer of an investment, as defined in article fifteen of this chapter, taxable under this article, a tax is hereby imposed, in addition to the tax imposed by section two hundred and twenty-one-a, of five per centum of the appraised inventory value of such investment, unless the tax on such investment as prescribed by article fifteen of this chapter or the tax on a secured debt as defined by former article fifteen of this chapter shall have been paid on such investment or secured debt and stamps affixed for a period including the date of the death of the decedent or unless the personal representatives of decedent are able to prove that a personal property tax was assessed and paid on such investment or secured debt during the period it was held by decedent." The constitutionality of this section was sustained by the Court of Appeals in *Matter of Watson*, 226 N. Y. 384, revg. 186 App. Div. 48. The United States Supreme Court has recently sustained the decision of the Court of Appeals. The history and purpose of the statute and its plain language require that this appeal be sustained.

It appears that the system of assessing personal

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property, and particularly bonds, throughout the state had been unsatisfactory, and that bonds easily and persistently escaped taxation in the localities by reason of their form. Thereupon the legislature, by various enactments beginning with 1911, provided for a relatively light stamp tax upon registration, of secured debts or investments with the state comptroller. The statute was permissive and not compulsory, the alternative being that if the bonds were not stamped, they were subject to assessment by the locality and no deduction for debts was permitted. The opinion of Judge Crane points out that the state had the power to place an inheritance tax upon property which had escaped taxation during the lifetime of the decedent. He states at page 401 of his opinion, *supra:* "It is a flat tax of five per cent upon the transfer of property not theretofore taxed as specified. Reference to the *investments* taxable under this article means the *investment securities* specified by article XV (Tax Law) passing by inheritance and taxed as stated in article X." Italics mine.

Section 330 of article 15 of the Tax Law defines the word "investments," and it is sufficient to say that it does not include within that term the word "interest."

The language of the various sections applicable is clear and unambiguous. The original stamp tax in the lifetime of the decedent is upon the principal of the investment only. The additional tax after death upon the transfer of this same investment must, therefore, be levied only upon the value of the principal of the investment.

If the property escapes taxation in the lifetime of decedent, the increased rate is to be imposed only upon the value of the principal in the transfer tax proceedings. There is no escape from the meaning

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of the words of the statute; explanation cannot clarify them, and the citation of authorities would only confuse their significance.

The comptroller contends that the words "appraised inventoried value" in section 221-b mean the inventoried value found by the appraiser. Accrued interest to the date of death is, of course, an asset taxable at the rates contained in section 221-a. By custom, valuations in the appraisers' reports have always included market value of the bonds, plus interest. This system has been one of convenience only, and cannot be used to sustain a tax under section 221-b. Nor does his contention that bonds are sold upon the various stock exchanges with accrued interest to the date of sale affect the result here. The purchaser necessarily pays the accrued interest on the current coupon to the vendor, but he is reimbursed for the amount of his advance of interest, when the coupon becomes due and is paid by the obligor. The item of interest is not part of the purchase price of the bond itself. Section 221-b was repealed by chapter 641 of the Laws of 1920. At the same session the article of the Tax Law relating to the tax on investments was repealed by chapter 646. The additional tax of five per cent on interest is improper and the appeal is sustained. I am aware that a contrary decision has been rendered in *Matter of Peck,* N. Y. L. J. March 3, 1920, and *Matter of Kolb,* 114 Misc. Rep. 361. For the reasons given I am compelled, however, to disagree with the determinations in those cases.

Appeal sustained.

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L. VICTOR WEIL and Another, Plaintiffs, v. JACOB J. LESSER, Defendant.

(City Court of the City of New York, April, 1921.)

Landlord and tenant — use and occupation — meaning of "rents" in section 4, chapter 944, Laws of 1920.

Where a tenant in possession of premises in the city of New York under a lease which expired on September 30, 1920, remained in possession of the premises without any new agreement having been made, the landlord under chapter 944 of the Laws of 1920 may maintain an action against the tenant to recover the rental value of the use and occupation of the premises.

The word "rent" in section 4 of chapter 944 of the Laws of 1920, means a reasonable return from the property.

MOTION for judgment on the pleadings.

Nathan D. Stern, for plaintiffs.

Engelhard, Pollak & Stern (George H. Engelhard, of counsel), for defendant.

MEYER, J. This is a motion for judgment on the pleadings. The plaintiffs sue to recover rental value for the use and occupation of the premises occupied by the defendant during the months of October and November, 1920. It appears from the answer that the defendant, prior to September 30, 1920, was a tenant of the premises in question under a lease which expired on that date. Subsequent to that date the defendant remained in possession of the premises during the months of October and November, without any new agreement having been made. Defendant also pleads, as a first defense, that the agreement is unjust, unreasonable and oppressive, and, as a

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second defense, that the landlords, on December 10, 1920, elected to accept him as their tenant for one year from October 1, 1920, upon the same terms, except as to duration, as he had occupied the premises during the year ending September 30, 1920. It was conceded on the argument that no notice to quit or vacate the premises had been served by the landlords on the tenant. The defendant claims that this is an action to recover the rental value for the use and occupation of the premises, and that such an action will not lie against a holdover tenant, contending that the only remedy of the landlords is either to accept him as a tenant for another year or to regard him as a trespasser. There is no doubt that prior to the passage of chapter 944 of the Laws of 1920 this was the rule in this state; if a tenant held over after the expiration of his term prior to the passage of chapter 944 of the Laws of 1920 the landlord had the right to elect either to treat him as a tenant for another year upon the same conditions as existed under the original lease, except as to duration (*Kennedy* v. *City of New York,* 196 N. Y. 19; *Souhami* v. *Brownstone,* 189 App. Div. 1) or to treat him as a trespasser and sue him in tort. *Kennedy* v. *City of New York, supra; Adams* v. *City of Cohoes,* 127 N. Y. 175; *Stevens* v. *City of New York,* 111 App. Div. 362; *Haynes* v. *Aldrich,* 133 N. Y. 287. Upon the passage of chapter 944 of the Laws of 1920, however, the situation changed and a new cause of action was created by statute. Subdivision 4 of chapter 944 says: "Nothing herein contained shall prevent the plaintiff from pleading and proving in such action a fair and reasonable rent for the premises and recovering judgment therefor, or from *instituting a separate action for the recovery thereof.*" The word "rent" as used in this section is not intended in its

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strict legal sense where the relation of landlord and tenant exists, but, in my opinion, was intended and used in the broader colloquial sense understood by laymen, that is, a reasonable return from real property. Tested in this sense it will be observed the statute gives an absolute right to bring a separate action for the rental value of the premises for use and occupation by reason of having taken away the right which was formerly vested in the landlord to recover possession of his premises. It is, of course, within the province of the legislature to create any new cause of action or any new remedy to take the place of the one which has been taken away, and the intention of the legislature to create such a new cause of action is borne out throughout the entire chapter, wherein the "rental value for the use and occupation of premises" is frequently referred to. Another reason for the conclusion that this new cause of action was created is that it clearly appears to have been the legislative intent to give to the landlord an effective hold upon his premises in order to enforce payment on the part of the tenant. If the landlord's sole remedy were only such as existed prior to the passage of the September Housing Laws, and because of his unwillingness to accept the tenant for another year he would be compelled to sue him as a trespasser, he would be powerless to invoke the aid of chapter 944 to recover possession of the premises should the tenant fail to make payment, and while the court would be enabled to determine what is the fair and reasonable value of the premises and grant judgment, the judgment would be only in the form of a money judgment, and the landlord would lose the benefit of the protection intended to be given to him by this legislation to have the fund deposited in court, nor could the court remove the tenant by reason of

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his non-payment of the judgment in five days as therein provided. It is hardly to be supposed that when such an extraordinary remedy is given to tenants that equal protection should not be given to landlords to receive the reasonable rental value of premises during the period in which the legislature has made it impossible for them to oust tenants from possession. For these reasons the motion for judgment on the pleadings must be denied, with ten dollars costs.

Motion denied, with ten dollars costs.

LINDENBERG CORPORATION, Plaintiff, *v.* HAROLD J. HOWLAND, Defendant.

(Municipal Court of the City of New York, Borough of Manhattan, Sixth District, April, 1921.)

Landlord and tenant — guaranty payment of rent — assignment of lease — meaning of "legal representatives" — when guarantor liable to assignee of landlord.

The term "legal representatives" in a guaranty of payment of rent under a lease, is broad enough to include an assignee of the landlord's interest in the lease.

In the absence of proof as to the intention of the parties to a guaranty of the payment of rent under an assignable lease which binds and runs in favor of not only the landlord and the tenant but also their respective successors in interest, the guarantor is liable to the assignee of the landlord for the tenant's default in the payment of rent, though the guaranty runs to the landlord and his "legal representatives."

ACTION against guarantor of rent.

Burger & Burger, for plaintiff.

Stetson, Jennings & Russell, for defendant.

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MARKS, J. Leo Lindenberg, being the lessee (not owner) of premises No. 33 West Fifty-fourth street, subleased to Maud W. Serrell and Clio Bracken, as tenants, the first floor of said premises at the rental of $5,500 for thirty months, payable in equal monthly payments of $185 in advance on the first day of each month. The lease was executed on March 10, 1920, and the term commenced April 1, 1920. The defendant signed a guaranty printed on the back of the lease, of which the following is a copy.

"In consideration of the letting of the premises within mentioned to the within named tenant, and the sum of one dollar to me paid by the said Landlord, I, Harold J. Howland, do hereby covenant and agree to and with the Landlord above named and his legal representatives, that if default shall at any time be made by the said tenant, in the payment of the rent, and the performance of the covenants contained in the within lease on their part to be paid and performed, that I will well and truly pay the said rent or any arrears thereof that may remain due unto the said Landlord, and also all damages that may arise in consequence of the nonperformance of said covenants, or either of them, without requiring notice of any such default from the said Landlord."

On April 30, 1920, Leo Lindenberg, the landlord, assigned the lease to the plaintiff corporation. The tenants failed to pay the rent for the months of November, 1920, to February, 1921, inclusive, and these actions are brought against the defendant, as guarantor, to recover the amount of such rent, and costs included in three judgments, recovered against the tenants for three months' rent, and rent for one month for which no judgment has yet been recovered.

In the case of *Evansville National Bank* v. *Kaufman*, 93 N. Y. 273, it is held that a special guaranty

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contemplates a trust in the person to whom it is addressed, and that no other person can accept its terms or acquire any advantage therefrom. That the surety is entitled to the application of the strict rule of construction, and cannot be held beyond the precise terms of the contract, and that only until a right of action has arisen thereon, is such guaranty assignable.

Citing this case and others to the same effect, the defendant claims that the guaranty is a special one, and is limited to the landlord and "his legal representatives," and that as "legal representatives" means only the executors or administrators of the landlord, and cannot be construed so as to include his assignee, as the landlord assigned the lease to the plaintiff corporation prior to the time when there was a default in the payment of rent, the plaintiff cannot recover on the guaranty.

No proof was offered on the trial as to the intention of the parties to the guaranty. In my opinion, the strict rule of construction of a guaranty applies where it clearly appears that the guaranty was intended only for the benefit of the person or persons expressly named, and there can be no doubt as to the meaning of who was intended to be benefitted thereby, but where it is extended to "legal representatives" which words have not always a clear and defined meaning, but may be held to include other successors in interest than executors or administrators, depending upon the context and the intent with which they are used, the court will favor that construction which shall accord with the apparent intention of the parties, in conformity with the rule governing the construction of contracts generally. To determine this question, the guaranty may be considered in connection with the lease to which it refers and to which it is

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attached. *Stillman* v. *Northrup*, 109 N. Y. 473; *Evansville National Bank* v. *Kaufman, supra.*

The phrase "legal representative" in the common use of those words and in their ordinary signification, is equivalent to executor or administrator, but it has lost much of its original distinctive force, and is now used to describe others than the representative of a deceased person. The words are not always used in their technical sense nor always with reference to the estate of a decedent. That the meaning to be attached to them in any particular case is often controlled by the context, and the intent with which they are used, as well as by the existing state of things, and the relative situation of the parties to be affected, and that they may be and have frequently been employed as meaning alienee, devisee, grantee, heir, purchaser, successor, and others succeeding to the interest of the person with respect to whom the words are used, is shown in the numerous cases cited in Cyc. (vol. 25, p. 175). The term "legal representatives" is not necessarily restricted to the personal representatives of one deceased, but is sufficiently broad to cover all persons who, with respect to his property, stand in his place and represent his interests, whether transferred to them by his act or by operation of law. *N. Y. Mut. Life Ins. Co.* v. *Armstrong*, 117 U. S. 591, 597.

"When found in instruments other than those relating to the administration of estates, or the affairs of a deceased person, it has been construed sometimes to mean assignees, or a certain class of purchasers, accordingly as it was supposed the parties must have understood it." *Warnecke* v. *Lembca*, 71 Ill. 91.

In *Griswold* v. *Sawyer*, 125 N. Y. 411, and *Sulz* v. *Mutual Reserve Fund Assn.*, 145 N. Y. 563, it is held that while the strict technical meaning of the words

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is executors or administrators, and they must be so construed in the absence of anything showing a different intent, yet as they are not always used in that sense, it is the province of construction in any case to ascertain the sense in which they were used, and that for that purpose the subject matter and the surrounding circumstances, as well as the language used, may be considered.

Applying the doctrine in the cases above cited, I conclude from a consideration of the lease, and its several parts, and the guaranty, the purpose to be accomplished, and the fair and necessary inferences to be drawn therefrom, that the use of the words "legal representatives" was intended to include the assignee of the landlord, and not only his legal representatives on his decease.

The lease contains a covenant and agreement on the part of the tenants to pay the total rent of $5,500 in equal monthly payments, and also provides: "This lease and every provision hereof shall bind, apply to and run in favor of the landlord, and the tenant and their respective successors in interest."

The guaranty covers default in the payment of rent and default in the performance of any of the covenants of the lease. This is not like a personal guaranty which cannot, before a breach, be transferred so as to inure to the benefit of other parties, but the intention appears to give a guaranty that there would be no breach of the lease, containing a covenant and obligation under and by which the tenants assumed to pay the entire rent, and for the performance and payment of which the guarantor assumed responsibility. The tenants remained liable for the entire sum while the lease was in force, and although a right of action for a month's rent did not accrue until the time fixed for payment, namely, on the first of each month after the

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execution of the lease, the liability on their part existed when the lease was executed, the time of payment being only postponed. The liability which the defendant assumed, had been created by the tenants, when the lease was made and the guaranty was signed, and did not arise solely by reason of their default afterwards.

This obligation and liability for the entire rent while the lease was in force, under the covenant on the part of the tenants to pay it, as well as all other covenants and terms of the lease, the defendant must be presumed to have known, as under his guaranty he makes himself liable for any default in the performance of the "covenants contained in the within lease," on the part of the tenants to be performed, without requiring notice of any such default.

There is no provision in the lease that the landlord cannot assign it, and providing, as it does, that it shall inure to the benefit of the successor in interest of the landlord, which must be read in connection with the guaranty, which refers to the lease, it is a fair and necessary inference that the defendant understood that impliedly, if not expressly, the landlord had the right to and might assign the lease, and that his rights thereunder would pass to his assignee, his successor in interest, which the words "legal representatives" in the guaranty were intended to include or were sufficiently broad to cover. As such assignee and successor in interest, the plaintiff is entitled to maintain these actions, and judgment is awarded in its favor in each action. See, also, *Flank* v. *Kuhlmann*, 63 Misc. Rep. 334; *Verschleiser* v. *Newman*, 76 id. 544.

Judgment accordingly.

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OTTO WENDE, Plaintiff, v. THE BOARD OF SUPERVISORS, ETC., et al., Defendants.

(Supreme Court, Erie Equity Term, April, 1921.)

Statutes — construction of — power of board of supervisors to increase salaries of county officers — County Law, § 12(5) — Laws of 1913, chap. 293.

The legislature having failed to except from the county officers whose salaries are to be fixed by the board of supervisors under the broad conditions of section 12(5) of the County Law notwithstanding any general or special law, the office of commissioner of charities and corrections of Erie county, created by chapter 293 of the Laws of 1913 and the salary fixed thereby, it must be held that it was the legislative intent that the power to increase such salaries should remain and be exercised by the board of supervisors in its discretion, and where the manner of the exercise of such power has been lawful, the complaint in a taxpayer's action to restrain the payment of the salary will be dismissed.

TAXPAYERS' action to restrain payment of salary to a county officer.

Feldman & Feldman, for plaintiff.

Asher B. Emery, for defendant supervisors.

Lewis & Carroll, for defendant Hunt.

BROWN, J. Plaintiff challenges the power of the board of supervisors to fix the salary of the commissioner of charities and corrections of Erie county.

By chapter 293 of the Laws of 1913 the legislature created the office in question, fixing the term at six years " and the salary thereof shall be $5,000.00 per annum." This was special legislation, applying only to Erie county. At the time of its enactment, section

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12, subdivision 5, of the County Law (Laws of 1911, chap. 359) provided that boards of supervisors "Have power to fix the amount and the time or manner of payment of the salary or compensation of any county officer or employee, except a judicial officer and the mode of appointment, number and grade of the clerks, assistants or employees in any county office, notwithstanding the provisions of any general or special law fixing the amount of such salary * * *; and the power hereby vested in the board of supervisors shall be exclusive of any other board, body, commission or officer, notwithstanding any general or special law. The salary or compensation of an officer or employee elected or appointed for a definite term shall not be increased or diminished during such term."

By chapter 742 of the Laws of 1913, subdivision 5 of section 12 of the County Law, above quoted, was so amended as to give boards of supervisors power to appoint and fix the term and compensation of any appointive county officer, notwithstanding such power be given by any general or special law to some other body, commission, authority or officer.

By chapter 358 of the Laws of 1914, subdivision 5 of section 12 of the County Law, as amended by chapter 359 of the Laws of 1911 and by chapter 742 of the Laws of 1913, above referred to, was amended by adding to the excepted officer whose salary the board of supervisors did not have authority to fix "an officer or employee of a county tuberculosis hospital," and by providing that "the power hereby vested in the board of supervisors shall be exclusive of any other board, body, commission or officer, except the authorities of a county tuberculosis hospital, notwithstanding any general or special law."

It is claimed by the defendant that chapter 742 of the Laws of 1913 and chapter 358 of the Laws of 1914,

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being enactments subsequent to chapter 293 of the Laws of 1913, must be deemed to have authorized the defendant to fix the salary of the commissioner of charities and corrections of Erie county, notwithstanding the fixing of the salary by chapter 293 of the Laws of 1913, a special law.

It is contended by the plaintiff that the provisions of chapter 742 of the Laws of 1913 and chapter 358 of the Laws of 1914, being the mere adoption of the language of chapter 359 of the Laws of 1911 and of subdivision 5 of section 12 of the County Law, can not be given any force as new legislation or construed as affecting or having any application to the office of commissioner of charities and corrections of Erie county, but must be construed and treated as of force only as of the date when such language originally came into the statute by chapter 16 of the Laws of 1909. The plaintiff asserts that section 95 of the General Construction Law peremptorily requires that such construction be given the statutes of 1913 and 1914; that these statutes "shall be construed as a continuation of such provisions of such prior law * * * and not as new enactments."

Is it quite correct to say that the provisions of chapter 358 of the Laws of 1914 are simple re-enactments of chapter 359 of the Laws of 1911 and chapter 742 of the Laws of 1913? It is certain that by chapter 358 of the Laws of 1914 the power theretofore existing in boards of supervisors to fix salaries of all county officers except judicial officers was further curtailed by adding to the excepted officers, officers of tuberculosis hospitals. It is equally certain that as to those officers that chapter was new legislation. It is a new statement of the powers possessed by boards of supervisors. The power of the boards to fix salaries was changed by this statute.

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It is not believed that there is such a conflict or inconsistency between the provisions of the County Law, as it existed when chapter 295 of the Laws of 1913 was enacted, and the provisions of the latter chapter as would necessarily require a decision that such subsequent enactment repeals, amends or modifies the County Law or takes away from the board of supervisors the power to increase the salary of the commissioner of charities and corrections and places the exercise of that power solely in the legislature.

By the broad provisions of the County Law (Laws of 1911, chap. 359) power is given to boards of supervisors to fix the salaries of all county officers, notwithstanding any other general or special law. Chapter 293 of the Laws of 1913 fixes the salary of defendant Hunt. Plaintiff asserts that the County Law must be deemed repealed by chapter 293 of the Laws of 1913, in so far as the power is conferred upon the board of supervisors to fix the salary of defendant Hunt; that the fixing of the salary as the sum named by chapter 293 of the Laws of 1913 withdraws from the board of supervisors all power to increase such salary at any time; and that the salary is fixed forever at the sum named unless the legislature makes some change. This repeal by implication is necessary for plaintiff's success. If the statutes can be harmonized on a workable, practical plan it is the duty of the court to so construe them. It is quite as satisfactory to adopt a solution that preserves both statutes as one that will destroy the earlier one. At the time the legislature enacted chapter 293 of the Laws of 1913 there was no county office of commissioner of charities and corrections in Erie county the salary of which could be fixed by the board of supervisors. By that chapter the office was created, and the salary fixed but not necessarily fixed forever. To say that such county

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office should thereafter be controlled as to its salary by the board of supervisors under the broad powers specified in the County Law does no violence to any provision of either statute. The power of the board of supervisors under the County Law is not interfered with, curtailed or amended. The fact that when the legislature did intend to take from the board of supervisors power to fix salaries of officers of tuberculosis hospitals by chapter 358 of the Laws of 1914 it specifically excepted such officers from the exercise of the power to fix salaries, warrants the assumption that it did not intend to except the office of commissioner of charities and corrections from the officers whose salaries are to be fixed as provided by the County Law. That this construction of chapter 16 of the Laws of 1909 and chapter 359 of the Laws of 1911, which were in force when chapter 293 of the Laws of 1913 was enacted, has legislative approval and parallel will be apparent when it is sought to analyze the purpose of enacting chapter 358 of the Laws of 1914, by which the power to fix the salaries of officers of tuberculosis hospitals is expressly taken from the board of supervisors. What was the intent of the legislature in passing this act? Obviously, it was to specifically provide that the board of supervisors should not have power to fix the salaries of officers of tuberculosis hospitals. Why was it necessary to enact chapter 358 of the Laws of 1914 to express such intention? The answer is, that by chapter 16, section 12, subdivision 5, of the Laws of 1909 (Laws of 1911, chapter 359) the power was given boards of supervisors to fix the salaries of all county officers except judicial officers, notwithstanding any general or special law giving such power to any board, etc., while in chapter 341, section 47, subdivision 2, of the Laws of 1909, the board of managers of tuberculosis hospitals were given power

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to fix salaries of officers and employees of such hospitals. Chapter 341 of the Laws of 1909 having been enacted subsequent to the enactment of chapter 16 of the Laws of 1909, it might be thought, in harmony with the reasoning of the plaintiff in the case at bar, that chapter 341 of the Laws of 1909 amended chapter 16 of the Laws of 1909 (the County Law) and took away from the board of supervisors such power to fix such salaries and placed such power in the board of managers. Such logic might be conclusive were it not for the fact that chapter 16 of the Laws of 1909, section 12, subdivision 5, had provided that the board of supervisors had power to fix all salaries except those of judicial officers, "notwithstanding the provisions of any general or special law * * * vesting in any other board * * * authority to fix * * * such salary * * * and the power hereby vested in the board of supervisors shall be exclusive of any other board * * * notwithstanding any general or special law." This quoted provision of chapter 16 of the Laws of 1909 was carried verbatim in chapter 359 of the Laws of 1911 and in chapter 742 of the Laws of 1913. It not being a new enactment, the legislature discovered that chapter 341 of the Laws of 1909, attempting by section 47, subdivision 2, to place the power of fixing salaries of officers of tuberculosis hospitals in the board of managers, was ineffectual because of the provisions above quoted from chapter 16 of the Laws of 1909, section 12, subdivision 5, which were in force; that such power to fix salaries of officers of tuberculosis hospitals was lodged in the board of supervisors. The only apparent way to take that power away from the board of supervisors was to enact chapter 358 of the Laws of 1914 and specifically except such officers from those officers whose

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salaries the board of supervisors was authorized to fix.

If it be true that chapter 293 of the Laws of 1913 took away from the board of supervisors the power to fix the salary of defendant Hunt at a sum in excess of $5,000, which power the board theretofore had by virtue of subdivision 5 of section 12 of chapter 16 of the Laws of 1909 and 1911, and forever prevented the board of supervisors from interfering therewith, then it logically follows that the managers of tuberculosis hospitals, by virtue of chapter 341 of the Laws of 1909, had the power to fix salaries of officers of tuberculosis hospitals, and the board of supervisors had no such power. The conclusion is irresistible that the board of supervisors did have such power up to the time chapter 358 of the Laws of 1914 was enacted. There was no other purpose or object in enacting chapter 358 of the Laws of 1914.

It therefore follows that the history of section 12, subdivision 5, of the Laws of 1909, through its various amendments and reenactments, contains on its face the legislative construction that the only way the board of supervisors could lose its power to fix the salary of officers of tuberculosis hospitals was through legislation specifically excepting such officers from the broad powers granted by that section and carried on its face since its original enactment in 1909. Such legislative construction can not be ignored; its adoption solves the problem and furnishes a workable and practical plan in spite of the apparent confusion presented by the statutes.

The legislature having failed to except the office of commissioner of charities and corrections from the county officers whose salaries are to be fixed by the board of supervisors under the broad provisions of section 12, subdivision 5, of the County Law, notwith-

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standing the provisions of any general or special law, the conclusion is reached that the legislature intended that the power to increase the salary of the defendant Hunt as commissioner of charities and corrections should remain in and be exercised by the board of supervisors in its discretion.

The manner of the exercise of that power has been lawful. The defendants must have judgment dismissing plaintiff's complaint, with costs.

Judgment for defendants.

CHARLES G. HOPKINS, Plaintiff, *v.* LINCOLN TRUST COMPANY, Defendant.

(Supreme Court, Monroe Special Term, April, 1921.)

Fraud — accrual of action — Statute of Limitations — Code Civ. Pro. § 382(5), as amended in 1920.

The amendment in 1920 to section 382(5) of the Code of Civil Procedure, which provides that in an action to procure a judgment for fraud the cause of action is not deemed to have accrued until the discovery by plaintiff or the person under whom he claimed, of the facts constituting the cause of action, does not change the limitation of years for actions of that character, but only provides for them, the same rule of computation formerly applied to equitable actions founded in fraud, and said section, as thus amended, is retroactive as well as prospective in its operation.

In an action brought since the amendment to section 382(5) of the Code of Civil Procedure in 1920, to recover damages for a fraud alleged to have been perpetrated about eight years before, the complaint alleged that the fraud was not discovered by plaintiff until about eight months before the commencement of the action. The six year Statute of Limitations applicable to the cause of action pleaded had expired about two years before the action was commenced. *Held*, that the amendment to said section of the Code of Civil Procedure, which became effective prior to the commencement of the action, was retroactive as well as prospective and that the action was maintainable.

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MOTION for judgment on the pleadings.

Nelson E. Spencer (Willis A. Matson, of counsel), for plaintiff.

Middlebrook & Borland (Middleton S. Borland, of counsel), for defendant.

SAWYER, J. Defendant moves for judgment upon the pleadings. The action was begun September 2, 1920, to recover money damages for a fraud said to have been perpetrated August 20, 1912. The complaint states that plaintiff did not discover the fraud until after May 1, 1919. The six year Statute of Limitations applicable to such a cause of action began to run from the time of the fraud, and had expired August 20, 1918, but by an amendment to subdivision 5 of section 382 of the Code, effective September 1, 1920, the legislature has provided that in "Any action to procure a judgment on the ground of fraud. The cause of action, in such a case, is not deemed to have accrued, until the discovery, by the plaintiff, or the person under whom he claims, of the facts constituting the fraud." As to causes, against which the statute has not run, concededly the limitation may be changed by the legislature, and any such cause would be included within the scope of the amendment in question. *Acker* v. *Acker*, 81 N. Y. 143; *Watson* v. *42nd, etc., R. R. Co.*, 93 id. 522. Where the time of limitation has fully expired before the enactment of the amending statute, restoration by such enactment of the right to maintain an action is not so clear. Statutes of limitation are remedial only: they in no manner partake of the nature of substantive law; they regulate only the methods whereby such law is applied to the affairs of men. *Hulbert* v. *Clark*, 128 N. Y. 295; *House* v. *Carr*, 185 id. 453-458. By the

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operation of those statutes a debtor obtains nothing; nor is he in fact freed from anything; he goes unharmed by his debt simply because the law furnishes his creditors no method whereby its collection may be enforced. If there be, however, two ways to that end, only one of which is barred by the statute, the open way may still be used against him. *Hulbert* v. *Clark, supra; House* v. *Carr, supra; Lightfoot* v. *Davis,* 198 N. Y. 261. The precise question has not until now been before our courts for determination, although Judge Earl in *Hulbert* v. *Clark, supra,* makes the statement, obiter, that "The legislature could repeal the Statute of Limitations and then the payment of a debt upon which the right of action was barred at the time of the repeal, could be enforced by action; and the constitutional rights of the debtor are not invaded by such legislation." This expression of the learned judge's opinion goes no further than to say that the legislature *has the power* to make such action retroactive. In some of the states this power has been by their courts expressly denied. *Pridgeon* v. *Greathouse,* 1 Idaho, 359; *McKinney* v. *Springer,* 8 Blackf. (Ind.) 506; *Cassity* v. *Storms,* 1 Bush (Ky.), 452. The Supreme Judicial Court of Massachusetts, however, in the only case before that court to which my attention has been called, carefully refrained from expressing an opinion upon the legislative power in that particular, but disposed of the then pending question against a plaintiff solely on the ground that a proper construction of their statutes indicated a contrary intent. *Wright* v. *Oakley,* 46 Mass. 400. The United States Supreme Court in a case coming to it on writ of error from the state of Texas has reached a conclusion entirely opposite from that in the Idaho, Indiana and Kentucky cases above cited, and held that Statutes of Limitation are of

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bar only, and that their repeal removes any hindrance otherwise existing against the prosecution of an action. *Campbell* v. *Holt*, 115 U. S. 620. Assuming that legislative power exists as is thought by Judge Earl in *Hulbert* v. *Clark, supra,* but that the question of its exercise depends upon intent, instead of following *ipso facto,* as held in *Campbell* v. *Holt, supra,* the query is at once presented, how is such intent to be determined?

On the one side is the doctrine that a repealing statute is prospective only unless otherwise therein specifically provided; while against it is asserted the claim that it being simply the removal of an existing bar, it follows, as a natural consequence, from the enactment that all things theretofore impeded are released, precisely as when, upon removal of a dam, the waters by it accumulated and impounded, are thereby set free to flow in their natural channel. Where the question is an open one, the normal and usual construction should be placed upon legislative acts, and in my opinion, when one abolishing a remedy theretofore existing is placed upon the books, without expressed limit in application, it would seem to cover all existing causes, and to be retrospective as well as prospective. This is especially true when it is considered that no vested rights have been obtained under the law so repealed. *Hulbert* v. *Clark, supra; Campbell* v. *Holt, supra.* This conclusion has not been arrived at without careful consideration of section 414 of the Code of Civil Procedure, subdivision 4, which reads "The provisions of this chapter apply, and constitute the only rules of limitation applicable, to a civil action or special proceeding, except in * * *: A case, where the time to commence an action has expired, when this act takes effect." It is believed by defendant that chapter 4 of the Code, wherein this

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section is found, *together with all changes or amendments* to its sections, became effective as of September 1, 1877 (Code Civ. Pro. §§ 3355, 3356), and that section 414, subdivision 4, must in the absence of retroactive provisions from the act be deemed to direct such amendment to be prospective only.

This may possibly be so when the Statute of Limitations has been amended as to time. It will be observed, however, that the amendment of section 382 which has given rise into this controversy does not change the limitation of years for actions of this character, but only provides for them the same rule of computation formerly applied to equitable actions founded in fraud. The words "rules of limitation" employed in section 414 apply, not to all the provisions of chapter 4, but only to those fixing the periods of time within which the various classes of action are to be brought. *Hayden* v. *Pierce*, 144 N. Y. 512. The amendment of 1920 not being a change of time, but only of method of computation, it seems needless to consider the question whether subdivision 4 of section 414 has reference to those causes which had expired by limitation prior to September 1, 1877, only, or should be carried along and applied to any amendment of chapter 4 of the Code as of the date of the amendment. *Goillotel* v. *Mayor, etc.*, 87 N. Y. 441, seems to run contrary to my conclusion, but upon examination it will be seen to have been decided under the provisions of section 73 of the Code of Procedure of 1848. It is, undoubtedly, a true interpretation of the phraseology of that section, but is not now an authority, for the reason that that section was repealed in 1876 and section 414 of the present Code of Civil Procedure, which establishes an entirely different rule, enacted in its place: A rule which in all actions involving limitations by time, superseded the

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authority of the *Goillotel* case. *Watson* v. *42nd Street R. R. Co., supra.*

From what has been said it follows that my construction of the amendment to section 382 (Laws of 1920, chapter 480) is, that it is retroactive as well as prospective in character, and as a consequence plaintiff's action may now be maintained.

Motion denied, with costs.

THE CITY OF NEW YORK, Plaintiff, *v.* THE NEW YORK TELEPHONE COMPANY, Defendant.

(Supreme Court, New York Special Term, April, 1921.)

Statutes — interpretation — power of public service commission to fix telephone rates — injunctions — Public Service Commissions Law, §§ 23, 92, 97.

The Public Service Commissions Law neither confers power upon the public service commission nor imposes the duty upon it to fix the rates which shall be charged in all cases for telephone service. (P. 267.)

Under section 97 of the Public Service Commissions Law the commission has the legal power not only to make orders fixing maximum rates for telephone service but to abrogate such orders and consent to an increase of rates. (P. 269.)

Under the Public Service Commissions Law the commission, aside from the power delegated to it by the legislature to fix maximum rates for telephone service, has power to consent to an increase of rates without determining what rates are reasonable and should thereafter be observed as maximum rates, when it appears that the conditions which prevailed when the earlier order was made have materially changed. (P. 272.)

The right of the public service commission to consent to an increase in a rate previously fixed is not subject to any limitation that it shall be given only after a complete hearing sufficient to enable the commission to determine the just and reasonable rates to be charged thereafter. (P. 267.)

An order of the public service commission fixing the maximum charges for telephone service is an attempt to predict for the

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future the charges that will yield a fair return, and so long as the Public Service Commissions Law contains no provision that the commission may not abrogate an order made by it fixing maximum rates for telephone service or consent to an increase except as part of an order fixing new rates, the commission, pending the hearing and determination of an application for an increase in rates, may consent that the rates fixed and determined by its previous order be increased by "certain additional percentages." (P. 268.)

Subject to the common law rule that no public service corporation may charge more than a reasonable rate for service, a telephone company may at will change its rates for telephone service only by filing schedules in accordance with section 92 of the Public Service Commissions Law, unless or until the public service commission has by an order fixed the maximum rate for such service in accordance with said section of the statute. (P. 267.)

By virtue of section 23 of the Public Service Commissions Law such an order remains in force only until "changed or abrogated by the commission," and when such order is abrogated the right of the telephone company to increase its rates by filing schedules is exactly the same as before the original order was made. (P. 268.)

ACTION for an injunction.

John P. O'Brien, corporation counsel (M. Maldwin Fertig, Joseph A. Devery, of counsel), for plaintiff.

Charles T. Russell (Edward L. Blackman, John L. Swayze, Edward W. Beattie, Carl M. Abromeit, of counsel), for defendant.

LEHMAN, J. On the 30th day of March, 1915, the public service commission of the state of New York for the second district, in accordance with the powers conferred upon it under section 97 of the Public Service Commissions Law, made an order determining the rates to be thereafter observed and in force as the maximum to be charged for telephone service within the zones embraced in the territory of the city of New

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York. The said order provided that the rates therein specified should remain in force for a period of three years and thereafter until the further order of the commission. On the 16th day of September, 1919, the public service commission made an order which constituted a modification of the previous order of September 16, 1919, reducing certain rates as specified in the earlier order, and it was provided therein that such rates should remain in force for a period of one year and thereafter until the further order of the commission. On the 1st day of October, 1920, the New York Telephone Company filed a petition "for the consent of the Commission to the Establishment of a New Schedule of Rates for Telephone Service in the City of New York," and it asked that the commission "after such hearing and deliberations as it may deem necessary, make an order authorizing and establishing the proposed rates as the legal rates to be charged for telephone service within the City of New York, such rates to be effective from October 1, 1920, or as soon as the reasonableness of said rates can be determined, and that it will make such further order or orders and such modifications of former orders as may be necessary in the premises." On the 18th day of October, 1920, the public service commission began hearings upon this petition and these hearings were continued from time to time till March 7, 1921. At these hearings the New York Telephone Company offered testimony in support of its petition, and the city of New York appeared regularly throughout the proceedings and cross-examined witnesses, but owing to the volume of the testimony presented by the petitioner and the intricacy of the details it has not yet completed the cross-examination of the petitioner's witnesses or presented its evidence to combat the claims of the New York Telephone Com-

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pany, and no testimony of any kind has yet been presented to the commission in behalf of the consumers. On the 23d day of February, 1921, the New York Telephone Company filed an additional petition with the commission for leave to put into immediate operation a schedule of rates to produce additional revenue. 25 St. Dept. Rep. 414. The city of New York opposed the application and insisted that the commission was without power or jurisdiction in the midst of the proceeding without having fully heard the proof offered by the city, to make any increase whatever; that the commission had no power to make temporary rates and argued upon the merits of the case as well as upon the law. Thereafter and on the 17th day of March, 1921, the public service commission made and entered an order which recites among other things that "It now appears to the satisfaction of the Commission from the evidence before it in the proceeding, and also from its knowledge and information of the general condition of said company, derived from its various reports filed with this Commission according to law and pursuant to the order of this Commission, that the increase in wages of employees made effective as aforesaid since the order of this Commission of September 16th, 1919, requires an additional annual expenditure of approximately eleven million dollars by said company, and to that extent decreases the income of said company from the amount anticipated it would receive from the rates established by said order of September 16th, 1919, when said order was made by this Commission." The order then provides that "pending the further continuation of this proceeding and without affecting the final determination thereof, the Commission does hereby consent that from and after April 1st, 1921, and until its further

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order in the premises, the rates of said New York Telephone Company for exchange telephone service in the City of New York as fixed and determined by the said orders of the Commission dated March 30th, 1915, and September 16th, 1919, be increased by " certain additional percentages. This consent was made conditional upon the filing of a bond providing for the repayment, to each and every subscriber in the city of New York, upon the final determination of the proceeding, of any amounts paid by said subscribers in excess of the rates or charges which may be fixed upon such final determination, and it was further provided in the order that " upon compliance with said condition said company may file upon five days' notice a tariff in accordance with the terms of this order." The city of New York now seeks to enjoin the New York Telephone Company " from imposing or entering against or collecting from any consumer of telephone service any rate or charge above the rates and charges fixed by the order of the Public Service Commission dated September 16, 1919."

The plaintiff claims that the public service commission was without power to make this order of March 17, 1921, because it is in effect a provisional order made before the completion of a hearing still pending and is an order which is intended to make the final determination of the commission after the completion of the hearing retroactive from the date of the provisional order. If the order of March seventeenth must be regarded as a provisional determination of " the just and reasonable rates, charges and rentals to be thereafter observed and in force as the maximum to be charged, demanded, exacted or collected for the performance or rendering of the service specified," then the contention of the plaintiff is sound, for the power of the public service commission to make such deter-

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mination is conferred only by section 97 of the Public Service Commissions Law and that section gives the public service commission power to determine such rates only after a "hearing" and does not expressly confer upon the commission any power to make any provisional or conditional determination pending the completion of the hearing nor can any power of such kind be inferred from the general provisions or intent of the act. In my opinion, however, the order of March 17, 1921, is merely a consent of the commission to an increase in the rate previously fixed by the commission and section 97 of the Public Service Commissions Law forbids an increase only if made without the consent of the commission, and I can see no ground for holding that the right to grant such consent is subject to any limitation that it shall be given only after a complete hearing sufficient to enable the commission to determine the just and reasonable rates to be charged thereafter.

The Public Service Commissions Law does not impose upon the commission either the power or the duty to fix the rates which shall be charged in all cases for telephone service. Section 92 of the law requires every telephone corporation to file schedules of its charges and provides that unless the commission otherwise orders no change shall be made in any rate except after thirty days' notice to the commission. Subject to the common law rule that no public service corporation may charge more than a reasonable rate, a telephone company may at will change its rates merely by filing schedules in accordance with this section unless or until the public service commission has by order made after a hearing, fixed the just and reasonable rates to be charged as the maximum for telephone services in accordance with the provisions of section 97. As long as such order remains in force the

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Telephone Company is bound by it, but under section 23 of the Public Service Commissions Law the order remains in force only until "changed or abrogated by the commission" and when such order is abrogated then obviously the right of a telephone corporation to increase its rates by filing of schedules is exactly the same as before the original order was made, and when the commission gives its consent to an increase of rates above the amount of the rates it had previously fixed as the maximum rate, then *pro tanto* the previous order is abrogated or at least suspended. The statute contains no provision that after an order fixing the maximum rates to be charged the commission may not abrogate such order or consent to an increase except as part of a new order fixing new rates which thereafter shall be observed and in force as the maximum to be charged. Such an order fixing maximum charges when made, like a statute of the legislature fixing maximum rates, is an attempt "to predict for future years the charges that will yield a fair return. The prediction must square with the facts or be cast aside as worthless." *Ex parte Young*, 209 U. S. 123, 147, 148. It must square with them in one year as in another, at the beginning but equally at the end. In all such legislation from the hour of its enactment there thus inheres the seed of an infirmity which the future may develop. It is the infirmity that always waits upon prophecy; the coming years must tell whether the prophecy is true or false. All that we can say at the outset is that the power to regulate exists. The validity of its exercise depends upon the nicety of the adjustment between forecast and events. This is as true of a regulation which looks forward a year as one which looks forward a decade or a century. In either case with differences only of degree, there is a forecast

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of the future which must be justified by the event." *Municipal Gas Co.* v. *Public Service Commission*, 225 N. Y. 89. The legislature having power to regulate telephone rates has delegated this power to the public service commission. By virtue of this delegated power the public service commission may fix maximum rates to be charged; but the legislature has also recognized that conditions may change and the maximum rate once fixed may not under changed conditions continue to be reasonable. Under such circumstances the public service commission may after a hearing fix new maximum rates, that such a hearing may as in this case, require an enormous mass of evidence and extend over a period of many months. It would be unjust and in some cases even beyond the power of the legislature to require the corporation furnishing telephone service to abide during these months by an order made at an earlier period if the "results" have not justified the "forecast." The legislature has given the public service commission the power not only to make orders fixing maximum rates but to abrogate such orders and to "consent" to an increase of rates. It would be unreasonable to hold without a clear expression by the legislature that when the commission is of the opinion that conditions have changed to an extent which renders the old rate unreasonable and perhaps unconstitutional, it must continue its old order in force and may not "consent" to an increase of rates pending the time when it can after a full hearing make a new "prophecy" as to what will constitute reasonable rates in the future. The commission has power not only to regulate rates but also to regulate service; it might under such power make an order which would greatly increase both the value and the cost of service. Can it be contended that it cannot make such an order to improve the

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service until after it has determined what will constitute a fair and reasonable maximum rate for the future upon necessarily protracted hearings or on the other hand that it can order the immediate improvement of service at increased cost, even though such increase of cost might render the return to the company unreasonable and confiscatory without consenting to an immediate increase of rates proportionate to the increased cost of service but postponing such increase until it has held hearings to determine what will be a fair and reasonable rate for the future, taking evidence at that time of all the factors which it must consider in fixing such a rate under section 97 of the Public Service Commissions Law. If the legislature had intended such construction, then the words "thereafter no increase in any rate, charge or rental so fixed shall be made without the consent of the Commission" in subdivision 1 of section 97 would be superfluous and meaningless. For these reasons in my opinion the legislature clearly intended that aside from power delegated to the commission to fix maximum rates after a hearing it should have power, upon such conditions as it saw fit to impose in the reasonable exercise of its discretion, to consent to an increase of rates whenever in its opinion the order previously fixing the maximum rates should no longer even temporarily remain in force. If at the time such consent is given no hearings are being held to determine the reasonable maximum rates to be observed in the future the commission may be compelled to hold such hearing upon a complaint that the increased rates are unjust or unreasonable, and the public and the corporation will thereby be protected, and if on the other hand, as in this case, such hearings are pending, the commission may make its consent conditional upon the continuance of such hearings and require a bond

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for the repayment of any excess over the rate which may be fixed upon the final determination of the pending proceeding as the reasonable rates and charges, but in neither case does the commission through its consent determine either finally or provisionally what constitute fair and reasonable rates to be charged thereafter as a maximum. It merely decides that pending the final determination of this question after a hearing its previous order fixing such rates should no longer remain in force.

It is urged by the city that such a construction nullifies the intent of the statute by giving the commission in spite of its previous orders the power arbitrarily to grant increases *ex parte*, and without being subject to judicial review, and that the commission might each time it makes a final determination immediately thereafter consent to an increase of rates so that in fact there would be no regulation. I need not now consider whether the order made by the commission consenting to an increase of rates is subject to review by the courts through a writ of certiorari, but I am certainly not holding that the commission may act unreasonably or arbitrarily in granting such consent. The persons entrusted with the execution of important powers under any law can act unreasonably and arbitrarily and in contravention of their clear duty and thereby for a time nullify the law, but public officers are always presumed to act reasonably in the performance of their duty, and when they fail to do so they can be removed, and no law should receive a construction based upon any assumption that public officers will be faithless to their trust. In the present proceeding it is fair to state that the city does not even claim that the commissioners have acted arbitrarily if they had power to act at all. It is not alleged that the old rate does in fact afford a reason-

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able return or that the cost of service has not in fact increased by the sum of $11,000,000 since the old rate was fixed, and the only claim of wrong is that the commissioners acted without power and could grant no such consent until the determination of the hearings for new maximum rates. I need not, even now, decide that the commission has power to grant such consent *ex parte* and without a hearing, for as pointed out above, the complaint itself alleges that the "city opposed the application and insisted that the commission was without power or jurisdiction in the midst of any proceeding without having fully heard the proof offered by the city to make any increase whatever; that the Commission had no power to make temporary rates and argued upon the merits of the case as well as upon the law." I merely decide that the commission under the statute has power to consent to an increase of rates without determining what rates are reasonable and should be observed thereafter as maximum rates, when it appears that the conditions which prevailed when its earlier order was made have materially changed.

While the power of the commission must be determined by the language of the New York statute and the construction of similar statutes of other jurisdictions by the courts of such jurisdictions are of little service, it is significant of the views of the legislatures and the courts in regard at least to the policy of granting such powers that in the case of *Chicago Railways Co.* v. *City of Chicago*, 126 N. E. Repr. 585, the Supreme Court of Illinois stated: "To sustain the judgment of the circuit court it is insisted that the commission had no authority to fix a temporary rate based upon increased operating expenses and could only make a change upon a full hearing which would demonstrate what a permanent rate ought to be. So far as we have been informed every court which has

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considered that question has determined to the contrary. *Omaha & Council Bluffs Street Railway Co.* v. *Nebraska City Railways Commission* (Neb.), 173 N. W. 690; *City of Charleston* v. *Public Service Commission* (W. Va.), 99 S. E. 63; *Kansas City* v. *Public Service Commission*, 276 Mo. 539; *O'Brien* v. *Public Utilities Commissioners*, 92 N. J. Law 44." It is also fair to point out that in the new Public Service Commissions Law enacted by the present legislature of this state the public service commission is granted express power to make provisional rates.

Even if, however, I held that the public service commission acted without power in making its order of March 17, 1921, I should still refuse an injunction. If the old rates are now confiscatory the New York Telephone Company could not only disregard those rates but might even under proper circumstances enjoin the public service commission from enforcing them. See *Municipal Gas Co.* v. *Public Service Commission, supra.* This court could not by its injunction compel the defendant to observe a confiscatory rate where even the public service commission could not enforce it. The complaint herein does not allege that the old rate is not confiscatory or the new rate unreasonable and though there may ordinarily be a presumption that the rate established by the public service commission is and remains reasonable and lawful, yet in the absence of any such allegation in the complaint and in view of the conceded facts herein I do not feel that such a presumption is sufficiently strong to justify the exercise of the extraordinary power of injunction. There are other points raised by the defendant which I have not found necessary to consider because for the reasons above stated the complaint must in any event be dismissed with costs.

Complaint dismissed, with costs.

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HARRY ALLEN, Claimant, v. THE STATE OF NEW YORK.

Claim No. 15531.

(State of New York, Court of Claims, April, 1921.)

Damages — interest upon award.

An award made pursuant to chapter 612 of the Laws of 1918, which is silent as to interest, carries interest under section 59-a of the Highway Law.

CLAIM for damages sustained by reason of change in grade of a highway.

George F. Thompson, for claimant.

Edward M. Brown, Deputy Attorney-General, for the State of New York.

CORWIN, J. This claim is for damage to real property situate in the village of Middleport, caused by the change in the grade of the highway in front of said property; and is made under the provisions of chapter 612 of the Laws of 1918, conferring upon the Court of Claims jurisdiction to hear, audit and determine all claims for damages theretofore or thereafter sustained by reason of change of grade of any highway or street caused by building new bridges and approaches thereto to the enlarged or improved canals in connection with the improvement of the Erie, Champlain and Oswego canals; and providing that the Court of Claims may make an award for damages suffered and render judgment therefor in favor of any claimant for the amount justly and equitably found to have been suffered by any claimant. The question to be determined is whether the court may allow interest upon an award made by virtue of the said statute. The statute itself is silent upon the subject.

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Section 59-a of the Highway Law (Laws of 1910, chap. 701) provides as follows: "Whenever awards shall be lawfully made, pursuant to any statute of this state, for damages sustained by real estate or any improvements thereon by reason of any change of grade of any street, avenue or road in front thereof, the award for the principal amount of damages sustained shall bear interest at the rate of six per centum per annum from the time of the change of grade to the time of the payment of the award."

In an opinion sustaining the constitutionality of this statute the Court of Appeals has held that this is a general law, embracing in terms all awards thereafter made. *People ex rel. Central Trust Co.* v. *Prendergast,* 202 N. Y. 188.

While it is difficult to conceive of language more broad and comprehensive than that in which the above quoted section of the Highway Law is couched, before it can be held to be applicable to claims against the state the question must be determined whether the state has, by either or both of the above quoted statutes, waived its immunity from liability to such an extent that in addition to the award, interest thereon may be allowed.

In *Smith* v. *State of New York,* 227 N. Y. 405, 410, the rule is enunciated that "Statutes in derogation of the sovereignty of a state must be strictly construed and a waiver of immunity from liability must be clearly expressed." Inasmuch as the enabling act of 1918 is silent upon the question of interest, it is apparent that an award of interest can be justified only by reliance upon the section of the Highway Law above referred to. This general statute in effect makes the interest allowed a portion of the damages sustained (*Matter of Murphy* v. *Prendergast,* 99 Misc. Rep. 326; affd., 179 App. Div.

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904; *Matter of Crane* v. *Craig*, 230 N. Y. 452); and this being so, the language of the enabling act authorizing the Court of Claims to "make an award for damages suffered and render judgment therefor in favor of any claimant for the amount just and equitably found to have been suffered by any claimant" is sufficient to authorize the allowance of interest upon the award from the time of the change of grade.

ACKERSON, P. J., concurs.

Ordered accordingly.

Matter of the Estate of AUGUSTA L. CUMMINGS, Deceased.

(Surrogate's Court, New York County, April, 1921.)

Transfer tax — vested remainders under trust deed — life tenant assumed to survive trust period — exemptions — Tax Law, § 221-a.

Decedent died intestate leaving a son and daughter as her only heirs at law and next of kin. Under a trust deed of decedent a remainder was to vest when said son attained the age of twenty-five years, or upon his previous decease. At the time of the transfer tax appraisal the son was seventeen years of age. The order fixing the tax assumed that the son had reached the age of twenty-five years and considered the remainder as vested as of the date of the appraisal in the son and daughter, thereby taxing the transfer of the various funds at the minimum rate against each equally. *Held*, that the tax was properly made and the appeal of the comptroller is overruled.

Independently of the amounts received by the beneficiaries as of the date of the death of decedent, the transfers deemed to have been effective and complete as of the date of the trust deed were properly subject to a transfer tax, and under the then existing statute were entitled to an exemption of $5,000.

Under the amendment to section 221-a of the Tax Law by

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chapter 664 of the Laws of 1915, the combined transfers to each beneficiary, effective at the date of decedent's death, were entitled to but a single exemption of $5,000.

APPEAL from order fixing transfer tax.

Rounds, Schurman & Dwight (Charles E. Hughes, Jr., of counsel), for trustees.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for state comptroller.

FOLEY, S. This appeal is taken by the state comptroller from the order fixing the transfer tax, upon two grounds, *first*, that the minimum tax to be paid on the valuation of the remainders has been improperly computed; *second*, that three separate exemptions have been improperly allowed on the transfers to the same person.

The decedent died intestate, leaving a son and daughter, her only heirs at law and next of kin. Three separate funds were found by the appraiser to be taxable, namely:

(A) $1,801,861.92, the value of part of the property conveyed in a trust deed by decedent on February 1, 1912. This transfer was found to be complete and taxable as of the latter date.

(B) $3,127,322.74, the value of property included in the trust deed, the transfer of which was found to have taken effect as of the date of death of the decedent, September 4, 1918.

(C) $453,467.13, the value of the other property which passed by the intestacy of the decedent upon her death.

None of the parties have appealed from the rule adopted by the appraiser in fixing the dates when the various transfers became taxable. Section 241 of the

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Tax Law provides for the determination of a tax on a contingent remainder at the highest rate possible on the happening of any of the contingencies or conditions under the will or deed. It also provides that the county treasurer " when such tax is paid shall retain and hold to the credit of said estate so much of the tax assessed upon such contingent remainders *as represents the difference between the tax at the highest rate and the tax upon such remainders which would be due if the contingencies or conditions had happened at the date of the appraisal of said estate.*" Further provision is made for the payment by the state to the trustees or executors of interest on this difference between the maximum and minimum tax as fixed in the order, or in the alternative, the estate is permitted to deposit securities to cover this difference and the income thereon may be withdrawn. Under the trust deed the remainder was to vest when the son Thomas A. Yawkey attained the age of twenty-five years, or upon his previous decease. Thomas A. Yawkey was only seventeen years of age at the date of the appraisal. The order fixing tax assumed that the life tenant had reached that age and considered the remainder as vested as of the date of the appraisal in the son and daughter of deceased, thereby taxing the transfer of the various funds at the minimum rate against each of them equally. The comptroller contends that the order could only assume the termination of the prior estate at the *death* of Thomas A. Yawkey, whereupon the entire remainder would have vested, under the terms of the deed, in the daughter, Emma Y. Gardner. The minimum tax based on fund A, mentioned above, under the former assumption, has been fixed in the order at $23,377.92 against each of the beneficiaries, or a total of $46,755.86. Under the method contended for by the state comptroller the

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minimum tax on this fund would have been approximately $55,500. The appeal of the comptroller on this point is overruled. Section 241 of the statute contemplates fixing an actual minimum tax to be computed as if the "contingencies or conditions had happened at the date of the appraisal." The statute also contemplates the termination of the prior estate at that date and the ascertainment of the persons in being in whom the estate would then vest in possession and enjoyment. Gleason & Otis Inheritance Taxation, 477–481; Chrystie Inheritance Taxation, 824. The taxing order cannot adopt a contingency which would yield a higher tax, and so in this estate it was proper to assume the survival of the life tenant to the age of twenty-five years, rather than his death before the expiration of that period. In *Matter of Parker*, 226 N. Y. 260, Mr. Justice Cardozo in construing section 241, says: "The purpose is to put at once into the treasury of the state the largest sum which in any contingency the remaindermen may have to pay * * *. The life tenant does not suffer, or, at all events not seriously, for interest is paid by the comptroller upon the difference between the tax at the highest rate and the tax that would be due if the contingencies or conditions had happened at the date of the appraisal. * * * Everywhere the scheme disclosed is absolute safety for the state, with a minimum of hardship for the life tenant." Unless an absolute minimum is fixed in the order, the life tenants will be deprived of the income upon the amount in excess of the lowest tax. In this estate this amount is substantial, approximating $9,000. As the payment of the minimum tax fixed is absolute, and no provision is made for returning the interest thereon to the life tenants (§§ 230, 225), they would be unjustly deprived of the income upon $9,000 for a period of eight years, if the son lived to be twenty-five years old. The intent

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of the legislature was clearly to void such a situation. Tax Law, § 241; *Matter of Brez*, 172 N. Y. 609; *Matter of Vanderbilt*, Id. 69; *Matter of Zborowski*, 213 id. 109; *Matter of Parker, supra; Matter of Canda*, 114 Misc. Rep. 161. The rule set forth by me is general only. Contingent remainders are essentially of a complicated nature. The terms of the trust and the facts in a particular estate may justify a departure from or an exception to this rule.

The appeal of the comptroller is sustained, as to the improper computation of the minimum tax on "Property passing as stated in paragraphs 'Seventh' and 'Eighth' of the report." For the reasons given below, the additional exemption of $5,000 each is disallowed and the tax should be computed upon each transfer of $1,563,661.37 at four per cent upon the entire fund. The order erroneously computes the tax beginning with one per cent upon the first $25,000; two per cent on the next $75,000; three per cent on the next $100,000, and four per cent on the balance. The lower rates provided for by section 221-a had already been exhausted in the computation upon the sum of $221,733.57 which was also transferred as of the date of death of decedent. In ascertaining the tax, funds B and C must be considered together. *Matter of Garcia*, 183 App. Div. 712; *Matter of Van Cott*, 180 id. 814.

Second. The appeal of the state comptroller in so far as the order has allowed three separate exemptions of $5,000 to each transferee in the computation of the minimum tax, is sustained. Two such exemptions only were deductible. The transfers which were deemed to have been effective and complete as of the date of the trust deed, February 1, 1912, were properly taxed independently of the amounts received by the beneficiaries as of the date of death of decedent. Under the statute then existing these transfers made

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in 1912 were entitled to an exemption of $5,000. Laws of 1911, chap. 732; *Matter of Hodges*, 215 N. Y. 447. "The time when the tax accrues, that is, when the transfers take effect, would seem to be the test whether transfers made by different methods or instruments should be taxed separately, or combined." *Matter of Van Cott, supra*, 817. Under the amendment to section 221-a by chapter 664 of the Laws of 1915, the combined transfers to each beneficiary effective at the date of death were entitled to a single exemption of $5,000. *Matter of Furnald*, N. Y. L. J., Jan. 14, 1921; affd., N. Y. L. J., April 15, 1921.

Order corrected accordingly.

JACOB KAISER, Respondent, *v.* RUDOLPH ZEIGLER, Appellant.

(Supreme Court, Appellate Term, Second Department, November-December, 1920, Term — Filed April, 1921.)

Landlord and tenant — effect of Eighteenth Amendment to the Constitution of the United States upon lease of premises to be used as a "saloon and hotel."

Where a case is submitted for decision upon statements of counsel, the facts as stated by the appellant in the court below must be accepted as true on appeal.

A covenant in a lease for five years made in 1916, of premises to be used and occupied as a "saloon and hotel," that the tenant will comply with all statutes "for the correction, prevention and abatement of nuisances or other grievances" does not cover the Eighteenth Amendment to the Constitution of the United States or any statute for the enforcement thereof.

Before said constitutional amendment became operative the landlord and tenant orally agreed that after it became effective there should be a reduction in the rent, and for several months the reduced rental was paid and accepted. In an action to recover the rent for the succeeding month in the amount

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reserved in the lease, *held*, that the adoption of the said constitutional amendment created a situation not within the contemplation of the parties when the lease was made, and terminated it.

APPEAL by the defendant from a judgment of the Municipal Court of the city of New York, borough of Queens, second district, entered in favor of the plaintiff after a trial before the court without a jury.

Benjamin Berger, for appellant.

Frederick S. Rauber, for respondent.

CROPSEY, J. No proof was taken on the trial. The case was submitted for decision upon the statements of counsel. For the purposes of this appeal, the facts as stated below by appellant's attorney must be accepted as true. *Adler* v. *Miles*, 69 Misc. Rep. 601, 603.

The action is for rent under a sealed written lease. The lease is admitted; also the non-payment of the rent sued for. The defense is that before the Eighteenth Amendment to the Federal Constitution became effective the tenant, claiming that his lease would be terminated when that amendment became operative, negotiated with his landlord for a new arrangement thereafter, and that the parties agreed that after the amendment became effective the rent should be $250 a month instead of $300 as provided in the lease. From the statement of counsel made upon the trial, it seems that rental reserved in the lease was paid up to January, 1920, and that the reduced rental was accepted by the landlord for the months of January and February. The same reduced amount was tendered for the month of March, but was refused. This action is to recover $300, the rent reserved in the lease

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for the month of March. Thus, the question is presented as to the effect of the adoption of the Eighteenth Amendment upon a lease of property for a saloon where intoxicating liquors were to be sold.

This lease was made in May, 1916. Its term was five years from its execution. It provided that the premises were to be "used and occupied as a saloon and hotel upon the conditions and covenants following." These are the conditions and covenants that may be material:

"*First.* The rent was to be paid in equal monthly payments of $300. in advance.

"*Third.* That the tenant shall promptly execute and comply with all statutes, ordinances, rules, orders, regulations and requirements of the Federal, State and City governments and all other departments and bureaus applicable to said premises for the correction, prevention and abatement of nuisances or other grievances in, upon or connected in said premises during said term, and shall also promptly comply with and execute all sales, orders and regulations for the prevention of fires, at his own cost and expense.

"*Fourth.* That the tenant shall not assign this agreement or under-let or under-lease the premises or any part thereof, or make any alterations in the premises without landlord's consent in writing, or occupy or permit or suffer the same to be occupied for any business or purpose deemed disreputable or extra-hazardous on account of fire, under the penalty of damages and forfeiture."

"*Ninth.* And the tenant further covenants that he will, during the term of this lease, keep and sell on the said premises certain beer known as 'George Ehret's Beer'."

It is urged that as the lease is under seal, it cannot be modified by a parol agreement. And this is so if

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the parol agreement is unexecuted. *Coe* v. *Hobby*, 72 N. Y. 141; *Zindler* v. *Levitt*, 132 App. Div. 397; *Stevenson Brewing Co.* v. *Junction Realty Co.*, 156 id. 271. But if the parol modification has been executed then it is effective. So this, in any event, would prevent the plaintiff, if he sought to do so, from recovering the difference between the original rental and the reduced rental for the months during which he accepted the reduced amount. *McKenzie* v. *Harrison*, 120 N. Y. 260; *Hayne* v. *Sealy*, 71 App. Div. 418. And if the landlord has himself breached the agreement, then a parol modification of a lease under seal, if made for a good consideration and if it has been partly executed, can be enforced. *San Reno Hotel Co.* v. *Brennan*, 64 Hun, 607. The decision of this appeal, however, does not necessarily turn upon the foregoing considerations. The contention of the appellant is that the passage of the Eighteenth Amendment terminated the lease and that the parties thereafter were free to make any new agreement they saw fit. If the adoption of that amendment had the effect of terminating this lease, then the plaintiff was not entitled to the judgment he has obtained.

The lease in its terms provides that the property is to be used and occupied as a "saloon and hotel." While the language does not say *only* for such purposes, or *not for any other* purpose, that is immaterial. Express words of restriction are not necessary where the language used shows that no other use was to be permitted than that specified. In such a case there is an implied covenant not to use the premises for any other purpose. *Weil* v. *Abrahams*, 53 App. Div. 313.

There is a conflict of authority in the various states upon the question of whether the adoption of a constitutional amendment or a statute enforcing prohibition, after the making of a lease, terminates it, where

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the premises were to be used as a saloon for the sale of intoxicating liquor. Some of the cases say that the lease is not affected by such an enactment, even though the tenant thereafter is wholly deprived of the use of the property. These cases seem to hold that if the tenant would be relieved from such a situation he should have provided against it by having a suitable clause inserted in the lease. *Goodrum Tobacco Co.* v. *Potts-Thompson Liquor Co.*, 133 Ga. 776; *Potts-Thompson Liquor Co.* v. *Capital City Tobacco Co.*, 137 id. 648, 654; *Hecht* v. *Acme Coal Co.*, 19 Wyo. 18. The great weight of authority, however, and that which seems to be founded upon the better reasoning, is to the effect that such an enactment destroys the subject matter of the contract and makes performance impossible and hence terminates the lease. *Heart* v. *East Tennessee Brewing Co.*, 121 Tenn. 69; *Kahn* v. *Wilhelm*, 118 Ark. 239; *Hooper* v. *Mueller*, 158 Mich. 595; *Brunswick-Balke-Collender Co.* v. *Seattle Brewing & Malting Co.*, 98 Wash. 12; *McCullough Realty Co.* v. *Laemmle Film Service*, 165 N. W. Repr. 33; *Christopher* v. *Charles Blum Co.*, 82 So. Repr. 765; *Burgett* v. *Loeb*, 43 Ind. App. 657, 659; *Houston Ice & Brewing Co.* v. *Keenan*, 99 Tex. 79; *American Mercantile Exchange* v. *Blunt*, 102 Maine, 128; *Greil Bros. Co.* v. *Mabson*, 179 Ala. 444. See, also, cases in Note, L. R. A. 1917 C, p. 935.

The same principle is involved in cases holding that an act of Congress, or of the president of the United States done pursuant to the authorization of congress, fixing the price of certain articles at a less sum than had previously been agreed upon between parties, relieved them from the obligations of their contract. *Boret* v. *Vogelstein & Co., Inc.*, 188 App. Div. 605; *Standard Chemicals & Metals Corp.* v. *Waugh Chemical Corp.*, 194 id. 254. See, also, *Mawhinney* v. *Millbrook Woolen Mills*, 172 N. Y. Supp. 461, 467.

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Upon the same principle it has been held that a lease for a moving picture show was terminated by the subsequent passage of a city ordinance prohibiting such shows in the leased premises. *Adler* v. *Miles*, 69 Misc. Rep. 601; and cases cited. In the case at bar, the court below apparently based its decision upon *Kerley* v. *Mayer*, 10 Misc. Rep. 718; affd., 155 N. Y. 636. But that case admittedly held that the tenant was not limited to using the premises as a saloon, but could use them for any lawful purpose. That being so, the passage of the statute prohibiting the existence of a saloon in the leased premises because of their location, was held not to terminate the lease.

Some courts, while agreeing with the rule that if the permitted use of the leased premises is prohibited by subsequent statute the lease is terminated, hold that this is not so if the tenant may continue to use the premises for any purpose. *Conklin* v. *Silver*, 174 N. W. Repr. 573. Upon this theory, although premises are to be used only as a saloon, inasmuch as such use permits the sale of cigars and non-intoxicating drinks as well as intoxicating ones, the subsequent prohibition against the sale of the latter has been held not to cancel the lease. *O'Byrne* v. *Henley*, 161 Ala. 620; *Matter of Bradley*, 225 Fed. Repr. 307. So a lease for a "saloon and restaurant" has been held not to be terminated because the tenant could still continue the restaurant (*Standard Brewing Co.* v. *Weil*, 129 Md. 487); and upon the same principle a lease as a "hotel and bar-room" has been held not to be affected (*Lawrence* v. *White*, 131 Ga. 840); likewise one for a "cafe"—as that was held to be an eating place (*Proprietors Realty Co.* v. *Wohltman*, 112 Atl. Repr. 410). But the true rule is believed to be that if the statute adopted after the making of the lease deprives the tenant of the beneficial use of the prop-

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erty—that is, prevents him from using it for the primary and principal purpose for which it was rented—the lease is terminated although other incidental uses might still be made of it. Thus, a lease of premises to be used as a saloon and restaurant and with the privilege of selling cigars and having a boot-black stand therein, has been deemed to be a lease for one main purpose, namely, the maintenance of a saloon, and the subsequent enactment of a prohibition statute has been held to terminate the lease. *The Stratford* v. *Seattle Brewing & Malting Co.*, 94 Wash. 125. And a lease for a "saloon and hotel" was held to be for a single purpose, and as the tenant could no longer use it as a saloon because of legislation, he was held to be relieved of his obligations under the lease. *Kahn* v. *Wilhelm*, 118 Ark. 239. And although the court recognized that non-intoxicants might be and were sold in saloons, where the tenant could no longer sell intoxicating liquors in premises leased for a saloon, the lease was held to be terminated. *Heart* v. *East Tennessee Brewing Co.*, 121 Tenn. 69.

In the case at bar the lease, as has been noted, provides that the premises are to be used as a "saloon and hotel," and it covers, in addition to the buildings, many specific articles of personal property, including: "bar, back-bar, steam table, motor, seltzer machine, ninety chairs, twenty-four tables, lunch counter, cash register, twenty beds, springs, mattresses, bedding, furnishings, two gas ranges, one coal range, three ice-boxes, ten beer pumps and pipes" and also all table, dish, and bed linen, glassware, and cooking utensils. From the lease there would appear to be twenty bedrooms in the premises. The premises of course were to be used as a hotel, but under the terms of the lease, only in connection with the maintenance of the saloon. Under the provisions of the Liquor Tax Law in effect

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at the time the lease was made, the sellers of liquor had greater privileges where the liquor tax certificate covered premises which were used as a hotel having more than ten rooms than in other places. § 30, subd. N. It is apparent from the lease that the lessor had an interest in furthering the sale of a particular kind of beer, for the tenant was required to covenant that he would "keep and sell on the said premises certain beer known as 'George Ehret's Beer'." We think the lease shows that the use of the premises as a hotel was not to be independent of their use as a saloon, but on the contrary that there was only one use contemplated and that was as the lease states, for a "saloon and hotel." It is difficult to conceive of any specified use of premises which would not permit of some other incidental use. And if the specified use was later prohibited by statute and tenant thus was prevented from using the premises for the purpose for which they were leased and for which they were to be used under the terms of the lease, it would be an injustice to hold that the lease was not terminated merely because some other incidental use could still be made of the property. Such a holding would mean that no lease could be held to be thus ended. We think the sensible and sound rule is that the lease is terminated where the premises may not be used longer for the purpose specified in the lease and that it is immaterial whether some incidental use might still be made of them. The passage of such legislation created a situation that was not within the contemplation of the parties when the lease was made. It changed the entire situation and brought to naught their agreement. To say the lease continued for some other use of the premises would be to make a new contract. The agreement cannot be carried out and the court should adjudge that it is terminated.

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The provisions in the lease in question do not cover the passage of a prohibition statute. The obligation of the tenant was to comply with all statutes "for the correction, prevention, and abatement of nuisances or other grievances." This does not cover such a statute or amendment as the one now being considered.

Since this opinion was written, our attention has been called to the case of *Doherty* v. *Monroe Eckstein Brewing Company,* 115 Misc. Rep. 175. The decision in that case is in exact accord with our views and is an additional authority in support of our determination.

Judgment reversed and new trial granted, with thirty dollars costs to appellant to abide the event.

KELBY and MANNING, JJ., concur.

Judgment reversed, and new trial granted, with costs to appellant to abide event.

JOHN H. FRESCHEN and GEORGE PUTCHER, Plaintiffs, *v.* WESTERN UNION TELEGRAPH COMPANY, Defendant.

(City Court of the City of New York, April, 1921.)

Telegraphs and telephones — telegraph company cannot relieve itself from the consequences of its wilful misconduct or gross negligence — liability for non-delivery of message — measure of damages.

A telegraph company is responsible for its neglect to perform its duties to one to whom a telegram is addressed as well as to the sender, and a stipulated limitation of liability binds both. (P. 292.)

While a telegraph company is liable for any neglect to exercise due care in the correct and prompt transmission of mes-

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sages, it may by contract limit its liability for mistakes or delay in the transmission of messages, but the general rule, irrespective of such a contract, is, that the company cannot in such manner relieve itself from the consequences of its wilful misconduct or gross negligence. (P. 293.)

Where a telegraph company never sent a cable message delivered to it for transmission, and the failure to deliver is not shown to have been due to mistake in transcribing or difficulty is transmitting, the company is guilty of gross negligence and is not relieved by limited liability stipulations nor does a stipulation relating to the time for presentation of notice of claim, exempt it from liability. (P. 296.)

In an action for damages for failure to transmit a cable message, brought by the addressee, it appears that a few days after the sender of the message had cabled from South America to plaintiffs in New York city an inquiry as to the price of brass tubes of a specified length and width, he sent to plaintiffs the cable forming the basis of the present suit, from which it plainly appears that the length and width of the tubes ordered were different from those contained in plaintiffs' offer. *Held*, that while the message could not be held to be an unqualified acceptance of plaintiffs' offer, it was at least a definite offer by the sender to plaintiffs contingent upon their acceptance, and that the addressee was entitled to show whether he would have accepted the offer, and that upon such testimony it became a question of fact whether he would have accepted it or not. (Pp. 297, 298.)

This question of fact having been resolved in favor of plaintiffs they were entitled to judgment for the difference between the market price and the contract price. (P. 298.)

ACTION for damages for failing to transmit a cable message.

Ringrose & Mann (Hyacinthe Ringrose, of counsel), for plaintiffs.

Francis Raymond Stark (Joseph L. Egan, of counsel), for defendant.

CALLAHAN, J. Plaintiffs bring this action against defendant to recover damages sustained by reason of the alleged negligence of defendant in failing to trans-

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mit a cable message. The conceded facts are that plaintiffs are copartners doing business under the firm name of Metal Products Company; that prior to August, 1917, their place of business was in Newark, N. J.; that on or about August first of that year they moved to No. 32 Broadway, New York city, and notified the manager of defendant at Newark to this effect on or about August ninth, requesting him to thereafter forward all telegrams and cables addressed to them at Newark to their New York address. The defendant's manager acknowledged receipt of this letter on August ninth, and promised to do as requested. The defendant is a domestic corporation engaged in the telegraph business. In July, 1917, plaintiffs communicated with one Lehky at Tucuman, Argentina, calling his attention to some boiler tubes which they had on hand and desired to sell. On September twenty-fifth said Lehky cabled to plaintiffs at Newark as follows: "Telegraph price shortest delivery thousand brass tubes fifty millimeter outside diameter gauge thirteen length four feet six inches each." The plaintiffs replied to this message as follows: "We are selling brass tubes forty-three cents per pound December shipment." On September 30, 1917, said Lehky deposited with the Central and South American Telegraph Company at Buenos Aires, Argentina, a message addressed to plaintiffs at Newark, reading: "Accept offer thousand brass tubes fifty millimeter outside diameter thirteen gauge length five feet two inches each price forty-three cents per pound FAS New York December shipment. Telegraph terms." The defendant received this message, and it was accepted by it, written on its filing form 1206, on the back of which was contained, among others, the following: "The company shall not be liable for mistakes or delay in the transmission or delivery, or for non-

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delivery of any unrepeated telegram, beyond the amount received for sending the same." The message in question was an unrepeated message, and all the company received for its obligation to transmit the same was the sum of fifty-four cents, which was its ordinary and reasonable charge for the transmission of such message without repetition. The message was never delivered. The blank of defendant also contained the following clause: "In any event the company shall not be liable for damages for any mistake or delay in the transmission or delivery or for the non-delivery of this telegram, whether caused by the negligence of its officers or otherwise, beyond the sum of $50, at which amount this telegram is hereby valued * * *." Another clause in the blank was to the effect that the company "will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the company for transmission." The plaintiffs testified that they did not have the brass tubes in question on hand, but that they could have purchased same on the date of the message and for some months thereafter at the sum of thirty-four and a fraction cents per pound, which sum was the market price at that time and for some time thereafter. The plaintiff, being the addressee and not the sender of the message in question, may still maintain this action. It is settled law that a telegraph company is responsible for its neglect to perform its duty to the person to whom the message is addressed as well as to the sender (*Halsted* v. *Postal Telegraph Cable Co.*, 193 N. Y. 293), and if there be a stipulated limitation of liability binding on the sender, the addressee is likewise bound thereby to the same extent as the sender. The defendant is a common carrier of messages, and in this respect bears the same relation to commerce as does a

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common carrier of goods. It must receive and transmit messages for every one on equal terms, and is bound to exercise care and diligence in the performance of these duties. By reason of the many difficulties attendant upon the transaction of its business as a telegraph company and the possibilities of mistake and delay, even with the exercise of care, a telegraph company is not subject to the strict rule of accountability applied to common carriers of goods. While it does not become an insurer of the correct and prompt transmission of messages, it is liable for any neglect on its part to discharge the duties incident to its business with due care and reasonable diligence. The peculiar risks and hazards attending the performance by telegraph companies of their functions entitle them to protect themselves against such risks and hazards of operation by limiting their liability by contract for mistakes or delay in the transmission of messages. But, irrespective of such contract, it is the general rule that a telegraph company cannot in such manner relieve itself from the consequences of its willful misconduct or gross negligence. *Dixon* v. *Western Union Tel. Co.*, 3 App. Div. 60; *Mowry* v. *Western Union Tel. Co.*, 51 Hun, 126; *Breese* v. *United States Tel. Co.*, 48 N. Y. 132, 141. In this case it is not shown that the message delivered by the sender to the original carrier was received subject to any special limitation as to liability. The sole proof is the concession that at the time the defendant accepted the message from the original carrier the same was written on a certain form of the defendant, on the back of which are contained, among others, the stipulations limiting liability above enumerated. Neither the sender nor the addressee is shown to have entered into such stipulation with the original carrier or with defendant, or to have had any notice thereof. Consequently they cannot be bound thereby.

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Even if the original carrier, as a condition for securing the transmission and delivery of the message by defendant to plaintiff, would have been permitted to make such stipulation in the sender's behalf, and by which he would be bound on the theory of agency, there is nothing to show that the original carrier actually entered into said contract of liability limitation or that it had any notice thereof. The fact that the message was written on defendant's blank, without showing the circumstances or by whom, is not sufficient to charge plaintiff with its contents. For aught that appears the defendant itself may have accepted the message and written same on its own blank. The defendant therefore cannot avail itself of the benefit of such limitations. In such case there is no necessity for drawing any distinction between ordinary and gross negligence, for plaintiff makes out a *prima facie* case of negligence by proving the contract to deliver and its breach. *Rittenhouse* v. *Ind. Line of Tel.*, 1 Daly, 474; 44 N. Y. 263; *Baldwin* v. *United States Tel. Co.*, 45 id. 744; *Pearsall* v. *Western Union Tel. Co.*, 124 id. 256. As no explanation has been offered by defendant to show the exercise of due care on its part, the plaintiff is entitled to such damages as the proof shows it has sustained. Even assuming that the conceded facts permit a finding that the message was received by the defendant subject to the limitations contained in its blank, and that the plaintiffs can be charged with notice thereof, I am of opinion that its failure to deliver the message was an act of gross negligence, and therefore it cannot claim the benefit of such limitations. An absolute failure to deliver a message, the receipt of which was duly acknowledged at the place from which it was to be delivered, does not come within the category of the peculiar risks and hazards attend-

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ant upon the accurate performance of its duty by a telegraph company, and hence is not such a breach of duty as to render it chargeable only with a lack of ordinary care. This is particularly so where, as here, there is offered no explanation for the failure to perform such duty. It is not a case of an inadvertent or mistaken act of the receiving operator in incorrectly transmitting the message or a delay due to atmospheric or other conditions to which the transmission of telegraphic messages is subject and which are not common to general business. The condition that the company shall not be liable beyond the amount of toll paid in case of mistakes or delays of unrepeated messages or for non-delivery is to be construed as referring only to such mistakes, delays or failures to deliver as might reasonably be supposed to be guarded against by repeating. It does not apply to the case of a failure to deliver a message which, though not repeated, was correctly and without delay transmitted to the office from which it was to be delivered. Sherm. & Redf. Neg. (6th ed.) § 555, and cases cited. It has been held that the failure of a telegraph company to transmit a telegram which had been delivered to one of its agents constituted gross negligence as matter of law. *Pierce* v. *Western Union Tel. Co.*, 177 N. Y. Supp. 598. So also has it been held that a failure to send a message at all or for some days after its delivery to the company for transmission is gross negligence for which the company is liable irrespective of a condition limiting liability in connection with the unrepeated messages. *Mowry* v. *Western Union Tel. Co.*, 51 Hun, 126. See also *Dixon* v. *Western Union Tel. Co.*, 3 App. Div. 60. *Kiley* v. *Western Union Tel. Co.*, 109 N. Y. 231, is not in conflict with these views. In that case it appeared that the message was delivered by plaintiff to defendant's office at Olean, N. Y., for transmission to his

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brokers in Bradford, Penn. That the operator could not send the same by direct wire to Bradford, but undertook to send it by way of Buffalo, and so informed plaintiff. The message never reached its destination, but the court says that it may be inferred that it did reach Buffalo, the reason for its not reaching Bradford being unexplained. The court held that the failure to deliver was not shown to be willful misconduct or gross negligence, but took occasion to state (p. 236): "It is not the case of a message delivered to the operator and not sent by him from his office." From all that appears here the defendant never sent the message received by it from its office. Its failure to deliver is not shown to be due to mistake in transcribing or difficulty in transmitting. All that appears is an absolute failure to perform its duty, unaccompanied by any explanation whatever of the cause of such failure. This, in my opinion, is gross negligence for the consequences of which defendant is not relieved by the limited liability stipulations. Nor does the stipulation relating to the time for presentation of notice of claim exempt defendant from liability from gross negligence. *Pierce* v. *Western Union Tel. Co.*, 177 N. Y. Supp. 598; *Richardson* v. *N. Y. Central R. R. Co.*, 122 App. Div. 120; *Isham* v. *Erie R. R. Co.*, 112 id. 612. A similar stipulation, designed to give immunity to a common carrier for the accountability which the law imposes on it, has been held not to bar a recovery for the non-delivery of goods, though the limitation period had elapsed before the action had been commenced. *Porter* v. *Southern Express Co.*, 16 Am. Rep. 762. Even assuming that the message in suit was interstate, though in fact there is no proof that defendant ever forwarded the same from New York, where it was received, to New Jersey, the place where it was addressed, the federal statute (U. S. Stat. at Large,

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chaps. 309, 544; 8 Comp. Stat. 1916, p. 9053) has not altered the situation. Such statute places telegraph companies, so far as interstate commerce is concerned, under the direct supervision of the interstate commerce commission and has permitted such companies to make rules and regulations for the conduct of their business which shall be deemed reasonable until changed by such commission. It has accordingly been held that a state law making null and void any stipulation required by a telegraph company as a condition precedent to establishing any claim or liability, is without effect to bind the company on the ground that the act of Congress has ousted the state of jurisdiction over the subject. *Gardner* v. *Western Union Tel. Co.*, 231 Fed. Repr. 405. But the federal statute neither changes the common-law rule of liability nor does it prevent a suitor from pursuing such common-law remedy in the state courts. It appears that the sender of the message over which this suit arises had previously cabled from South America to plaintiffs inquiring as to the price of brass tubes fifty millimeter outside diameter, gauge thirteen, length four feet six inches each, to which plaintiffs replied: "We are selling brass tubes 43 cents per pound December shipment." A few days thereafter the cable forming the basis of this suit was dispatched by the sender to plaintiffs, and reads as follows: "Accept offer thousand brass tubes 50 millimeter outside diameter, 13 gauge, length 5 feet 2 inches each, price 43 cents per pound, FAS New York, December shipment; telegraph terms." Notwithstanding the opening words "accept offer," it plainly appears that the length and width of the tubes so ordered is different than contained in plaintiff's offer, and therefore the message cannot be held to be an unqualified acceptance of plaintiff's offer. On the other hand, it is not

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a mere step in the negotiations, but at least a definite offer by the sender to the plaintiffs contingent upon their acceptance. In such case it has been held that the addressee may show whether he would have accepted the offer and that upon such testimony it becomes a question of fact whether or not he would have so accepted. *Pfeister* v. *Western Union Tel. Co.*, 118 N. E. Repr. 407. This is here found as a fact. The measure of damages is the difference between the market price, which I find was 35 cents per pound, and the contract price, which difference amounts to $865.28, for which sum plaintiffs are entitled to judgment. Verdict directed for plaintiffs in the sum of $865.28.

Judgment for plaintiffs.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* MARTHA HARDING, Appellant.

(County Court, Erie County, April, 1921.)

Criminal law — when accused not entitled to jury trial — Code Crim. Pro., § 887, subd. 4(e).

Upon a charge of having violated section 887, subdivision 4(e) of the Code of Criminal Procedure, the accused is not entitled to a jury trial as matter of constitutional right.

APPEAL from a judgment of conviction.

Ernest W. McIntyre, for appellant.

Guy B. Moore, district attorney (Frank Bret Thorne, assistant district attorney), for respondent.

NOONAN, J. The appellant was tried in the City Court of Buffalo for violating section 887, subdivision 4 (e), of the Code of Criminal Procedure. When

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arraigned she pleaded "not guilty" and was duly informed of all her rights under the law, and was also represented by able counsel, who then demanded a jury trial, which was denied by the court. The trial then proceeded and the defendant was found guilty.

From this judgment of conviction she has appealed. As the evidence offered leaves no doubt as to her guilt, the only question left for consideration is whether or not the demand for a trial by jury was properly denied.

As the power to punish vagrants under the Code of Criminal Procedure was greatly enlarged by chapter 502 of the Laws of 1919, and as it is now possible under section 891A to impose a sentence, not exceeding three years, to a correctional institution, or to a jail, penitentiary or other penal institution for a period not to exceed one year, it is urged that as the punishment now provided is so much more severe than under the old provisions, the former decisions construing this law are no longer applicable, and that the defendant should now be entitled to a jury trial as a matter of right.

The constitutional provision for a jury trial (Art. 1, § 2) is: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; * * *." This section has reference to a trial by a common law jury of twelve men (*People* v. *Cosmo*, 205 N. Y. 91; *People* v. *Special Sessions*, 74 id. 406) and has been in force since 1777. Courts of Special Sessions have existed since 1744 to the present time, but no jury was permitted in these courts until 1824, when the *legislature* provided for a jury of *six* (*People* v. *Justices*, 74 N. Y. 406), so that any right that a defendant may have to a jury trial in a court of Special Sessions is statutory and not constitutional, and hence in the absence of statutory provisions therefor, the defendant is not entitled to a jury trial as a matter of right.

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The words "heretofore used" refer to the time which antedates the adoption of the original Constitution when the common law was in force (*People* v. *Cosmo*, 205 N. Y. 91, citing *Duffy* v. *People*, 6 Hill, 75), and we find (see Colonial Act of Sept. 1, 1744) that in 1744 provisions were made for the summary trial, without jury, of all offenses below the degree of grand larceny. Such persons were classed as disorderly persons or vagrants. In *People* v. *Putnam*, 3 Park. Cr. Rep. 386, Judge Pratt says: "But there was always a class of persons or offenders, who, from the commencement of the government, have been accustomed to be dealt with summarily before inferior magistrates, and to whom the right of trial by jury has not been granted. These were classed under the heads of vagrants and disorderly persons." In *People* v. *McCarthy*, 45 How. Pr. 97, Judge Davis said: "That the legislature have power to enlarge the class of persons to be affected by laws against disorderly persons and to be summarily tried by the magistrates of the state, seems to be well settled by the authorities."

The only statutory provision that I find relating to jury trials is section 702 of the Code of Criminal Procedure, which reads: "Before the court hears any testimony upon the trial, the defendant may demand a trial by jury." The application of this section is limited to crimes and misdemeanors created and defined by the Penal Law (*People* v. *Van Houten*, 13 Misc. Rep. 408; affd., 91 Hun, 638), and, therefore, the appellant has no right to a jury trial under this statutory provision.

Violations of section 887 of the Code of Criminal Procedure are not crimes or misdemeanors but only *quasi* criminal or statutory offenses to be summarily dealt with. *People* v. *O'Neill*, 117 App. Div. 826;

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Frank v. *Keeper, etc.*, 38 Misc. Rep. 233, 240; *Forster* v. *Warden*, 39 id. 700, 702.

As it has already been decided (*People* v. *Davis*, 143 App. Div. 579) that a law authorizing magistrates to commit women, within certain age limits, to the Bedford Reformatory on conviction of being common prostitutes, is not unconstitutional in that it authorizes such persons to be restrained of liberty for a period not exceeding three years without provision for a trial by a common-law jury, and as all the cases hold that the right to a jury trial before a magistrate is statutory and not constitutional, and as I find no statutory provisions compelling a magistrate to grant a jury trial in the case at bar, it follows that the denial of a jury trial in the city of Buffalo was right and the judgment of conviction is affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK *v.* AUGUSTUS DRUM PORTER, Defendant.

(Court of General Sessions of the Peace, in and for the County of New York, April, 1921.)

Criminal law — indictment — uncorroborated testimony of police officers — accomplices — indictment dismissed.

Where an indictment is found solely upon the uncorroborated testimony of police officers, who are to be deemed the accomplices of the defendant in the crimes charged against him, a motion to dismiss the indictment will be granted with leave to resubmit the case to the grand jury.

MOTION to set aside indictment.

Martin W. Littleton, for defendant.

Edward Swann, district attorney; Felix C. Benvenga, assistant district attorney, for people.

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ROSALSKY, J. On March 22, 1920, the defendant was indicted by the grand jury upon three counts, the first and second of which allege that the defendant committed the crime of wilfully omitting to perform a public duty enjoined by law upon him as a public officer (Penal Law, § 1841); and the third count alleges that the defendant committed the crime of attempting, by means of a threat, to deter and prevent an executive officer from performing a duty imposed by law upon such officer. Penal Law, § 1824. On consent of the district attorney, the defendant was furnished with a copy of the minutes of the grand jury, and he now moves to set aside the indictment, principally on the ground that it was founded upon the uncorroborated testimony of accomplices. Code Crim. Pro., § 399.

It is necessary briefly to refer to some of the proof presented to the grand jury with a view to determining whether the claim of the defendant warrants the deduction that police officers Wheelwright and Sorger are accomplices, and if so, whether the record is barren of proof tending to corroborate their testimony. Police officers Wheelwright and Sorger, on the night of November 12, 1919, went to the premises 324 West Ninety-sixth street, in the borough of Manhattan, county of New York, for the purpose of ascertaining whether one Adele Goodell conducted an apartment on the third floor of said premises in a disorderly manner. They secreted themselves on the landing between the third and fourth floors of this building and kept the apartment of the Goodell woman under observation and at about eleven o'clock that night they saw the defendant and a woman enter the Goodell apartment. The police effected an entrance into the apartment and immediately proceeded to the second bedroom; they forced the door and entered the room, in which they found the defendant dressed in his under-

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wear and wearing his socks, and the woman was entirely nude, lying in bed. Police Officer Wheelwright told the defendant that he was going to place the woman who was with him in the room under arrest. The defendant told officer Wheelwright that he wanted to speak to him, and they both went into an adjoining room, while police officer Sorger remained in the room with the woman. The defendant then told Wheelwright that he was Third Deputy Police Commissioner Porter and showed his credentials. Officer Wheelwright told him that he was sorry but that he must arrest the woman, and upon being told by the defendant not to do so, officer Wheelwright conferred with officer Sorger and told him who the defendant was; whereupon these officers permitted the defendant and the woman to leave the premises without arresting her. The police, however, arrested the Goodell woman on a charge of keeping a disorderly house. It was stated by both sides that she was tried in the Court of Special Sessions and acquitted of this charge.

From the evidence it is clear that the only reasonable conclusion to be drawn is that police officers Wheelwright and Sorger conspired with the defendant not to arrest the woman referred to in the indictment as Jane Doe. In the criminal arrangement to aid the defendant in liberating this woman, these officers must be condemned as accomplices as a matter of law. Their misconduct brings them within the generally accepted test that " To constitute an accomplice one must be so connected with a crime that at common law he might himself have been convicted either as the principal or as an accessory before the fact. To warrant such a conviction the one accused must have taken part in the perpetration of, or preparation for, the crime, with intent to assist in the crime. Every act which may have a tendency to assist in the perpetra-

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tion of the crime is not, of absolute necessity, criminal. Before it will have that effect it must have been done with the *intention* on the part of the actor that it shall aid in the commission of the crime." *People* v. *Zucker,* 20 App. Div. 363, 365; 154 N. Y. 770; *People* v. *Bright,* 203 id. 73; *People* v. *Sweeney,* 213 id. 37; *People* v. *Swersky,* 216 id. 471; *People* v. *Cohen,* 223 id. 406; *People* v. *Doyle,* 107 Misc. Rep. 268.

The People contend that the acts charged against the defendant in the first count, namely, " that the defendant unlawfully did fail, refuse and neglect to direct and command police officers Wheelwright and Sorger to arrest Jane Doe, but on the contrary, he wilfully did direct and command them not to arrest Jane Doe," were of such a character that they could be committed only by a superior officer, and that since neither police officer possessed the power and authority of a deputy police commissioner, it was legally impossible for the police officers to participate in any of these acts. The police officers could not, of course, be guilty of these acts charged against the defendant with respect to his directing, inducing or commanding them not to arrest the " woman," since they possessed none of the powers of the defendant. But the learned district attorney overlooks a very important and material allegation contained in this count, namely, " that the defendant wilfully did fail, refuse and neglect to arrest Jane Doe." With respect to this allegation, the law and the rules of the police department impose a plain duty not only upon the deputy police commissioner, but upon every police officer, to arrest and apprehend persons committing crimes and violating the laws of the State of New York and the ordinances of the city of New York. It is manifest that the acts charged against the defendant and the police officers come within this allegation of the indictment.

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From the evidence before the grand jury, the only inference to be drawn is that the defendant and the officers were concerned in the crime of wilfully omitting to perform a public duty enjoined by law upon public officers for failing, neglecting and refusing to arrest Jane Doe. This is the gist of the crime charged in the first and second counts, and this is the crime that the defendant and the police officers were all capable of committing. They were all concerned in the scheme not to arrest Jane Doe, and each one of the public officers aided and abetted the other in the commission of the crime. Penal Law, § 2. When the defendant, as charged in the first count, wilfully directed and commanded the police officers, in violation of their duty, not to arrest Jane Doe and permit her to go free and the police officers, yielding to his inducement, direction and command, failed to arrest her for a violation of the law committed in their presence, all of the parties to this arrangement and understanding became members of the same conspiracy to violate their duty as public officers, and they all became concerned in the crime of wilfully omitting to perform a public duty enjoined by law upon them as public officers.

The fact that officers Wheelwright and Sorger may, for some reason, be incapable of committing the same or some of the acts attributed to the defendant with respect to his public duty, is not material (*People* v. *McKane,* 143 N. Y. 455), so long as the police officers were concerned with him in the commission of the substantive crime charged against him in the first count. It is impossible to segregate the acts of the alleged criminality on the part of the defendant and the two police officers. According to the district attorney's own theory of the case, he specifically, in the second count, charges the police officers with wilful neglect

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of duty, and the defendant with having aided and abetted them in the commission of that crime.

It is urged by the People that inasmuch as the police officers, under threats and coercion of their superior — the defendant — obeyed his direction not to arrest Jane Doe, they cannot be deemed accomplices, but should be viewed as "victims." To adopt this suggestion, that the police officers be regarded as victims instead of perpetrators of or participants in the crime charged in the first and second counts, would be introducing a dangerous doctrine into the criminal law, and would be subversive of the best interests of organized society. It is essential to an orderly administration of justice that no discretion be vested in a police officer to flout a duty enjoined upon him by law where there is proof that the criminal law has been violated. A public officer should be held to a strict performance of and responsibility for the duties which the law enjoins upon him.

While it may be conceded that the official position of the defendant may have instilled fear in the police officers that if they did not obey him they might be oppressed or penalized, nevertheless, such a belief on their part cannot excuse their conduct of granting immunity to a violator of the law. The police officers were not subjected to duress when they yielded to the command of the defendant not to arrest Jane Doe. If the defendant had threatened the police officers with instant death or grievous bodily harm unless they obeyed him and the police officers entertained reasonable apprehension for their lives or safety, then and then only, could their failure to arrest Jane Doe be legally excused. Section 859 of the Penal Law embodies the recognized and well-established rule on this subject. This section provides as follows: "Where a crime is committed or participated in by

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two or more persons, and is committed, aided, or participated in by any one of them, only because, during the time of its commission, he is compelled to do, or to aid or participate in the act, by threats of another person engaged in the act or omission, and reasonable apprehension on his part of instant death or grievous bodily harm, in case he refuses, the threats and apprehension constitute duress, and excuse him."

Prof. Wharton, in his celebrated Treatise on Criminal Law, in discussing the question of acts committed by a person due to coercion, compulsion and duress, states the following: "The fact that a crime is committed under coercion and compulsion, in fear of instant death, may be set up as a defense to the prosecution for the commission of such crime; but, to be available as a defense, the fear must be well-founded, and immediate and actual danger of death or great bodily harm must be present, and the compulsion must be of such a character as to leave no opportunity to accused for escape or self-defense in equal combat. It would be a most dangerous rule if a defendant could shield himself from prosecution for crime by merely setting up a fear from or because of a threat of a third person (Sec. 383). The fact that an act is done by an officer of the government, or an agent or representative of the government acting under the direction of a superior officer of the government, will not constitute a ground of defense, and exempt the person so acting from personal liability for the wrongful act; the official position affords no immunity from criminal prosecution." Sec. 377. The same rule applies with respect to the omission to perform an act enjoined by law.

In *People ex rel. Eggers* v. *Bingham*, 121 App. Div. 393; affd., 190 N. Y. 566, the court said: "Even if he (the relator being a police officer) refrained from the

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performance of his duty in obedience to the request of Howell, this cannot of course excuse his conduct. If he had knowledge that the law was being violated, it was his duty to suppress the violation; but if in failing to do this he acted under orders of his superior, we think the punishment was too severe." P. 595.

It is also urged that the police officers cannot be deemed accomplices of the defendant with respect to the third count because they could not be indicted for the same crime. This contention is without force. The question whether a witness is the accomplice of a defendant depends not upon the charge in the indictment, but upon the evidence establishing that the witness was jointly concerned with the defendant in the commission of a crime. This rule is very tersely stated by Mr. Justice McLaughlin in *People* v. *Hyde*, 156 App. Div. 618, 627, in which case the eminent and learned jurist said: "But in the nature of things, one is or is not an accomplice of another, not because he is or is not *indictable* for the same or another offense, or by reason of the form of the punishment which the statute has prescribed, but by reason of what he has done, and of the part which he has taken in the commission of the crime, and it would seem, under section 2 of the Penal Law, that notwithstanding the giving and the receiving of a bribe are made distinct crimes, yet the giver may be indicted as a principal in the crime of receiving, and *vice versa*." P. 627.

People v. *Maynard*, 151 App. Div. 790, is to the same effect.

In *People* v. *Hyde, supra*, the learned judge further said: "The subject was discussed at some length by the Supreme Court of Massachusetts in *Commonwealth* v. *Smith* (11 Allen, 243), the question being whether a suborner of perjury was an accessory before the fact of the perjurer. The court said: 'The

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crime of subornation of perjury is clearly in its nature that of an accessory before the fact to the perjury. Both perjury and subornation are felonies under our statute, being punishable by imprisonment in the State prison. * * * Whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact, for it is not necessary that there should be any direct communication between the accessory and the principal. * * * And the accessory is a felon, though his felony is different in kind from that of the principal. * * * So it is said to be a principle in law which can never be controverted, that he who procures a felony to be done is a felon. * * * We cannot see that the application of these principles is changed when the crime of the accessory before the fact is made by statute a substantive felony. The object of making it a substantive felony may be either to provide a distinct or milder punishment upon conviction, or to authorize the indictment and conviction of the accessory where the principal has not been convicted.'

"In *People* v. *Evans* (40 N. Y. 1) it was held that the subornation of perjury may not be proved by the uncorroborated testimony of the person suborned, and in *People* v. *Gilhooley* (108 App. Div. 234; affd., 187 N. Y. 551) it was assumed that the perjurer was the accomplice of the suborner."

From these cases it is apparent that it does not necessarily follow, because a witness who committed certain acts cannot be convicted of the precise crime as the person with whom he was concerned in the commission of a crime, he is not to be deemed an accomplice. This theory has also been exploded with respect to the relationship between a thief and the receiver. Larceny and criminally receiving stolen property are separate and distinct crimes, and still

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the courts have held that the thief is an accomplice of the receiver. *People* v. *Willard*, 159 App. Div. 19; *People* v. *Markus*, 168 id. 184; *People* v. *Kudon*, 173 id. 342.

The third count of the indictment would be valid if the proof established that the police officers and the defendant had not entered into a conspiracy to violate the law. The fact that the defendant, by means of a threat, procured the police officers to violate their duty, does not relieve them from being accomplices in the crime charged under section 1841 of the Penal Law. It, therefore, makes no difference that the police officers could not be prosecuted under section 1824 of the Penal Law, since the defendant, as has already been shown, could be indicted under section 2 of the Penal Law, as a principal in the crime committed by the police officers, and they, in turn, could also be indicted for aiding and abetting the defendant in the crime committed by him. Penal Law, § 1841.

The next question to be determined is whether there was any evidence corroborating the testimony of police officers Wheelwright and Sorger to have warranted the grand jury in returning an indictment against the defendant. I have carefully read the testimony of police officer Cushing and I fail to find anything in his testimony which in the slightest degree tends to corroborate his brother officers.

The Code of Criminal Procedure expressly provides that: "A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the crime." Code Crim. Pro. § 399. It also provides that an indictment should not be found by the grand jury unless "all the evidence before them, taken together, is such as in their judg-

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ment would, if unexplained or uncontradicted, warrant a conviction by the trial jury." § 258.

It is manifest, therefore, that if the only testimony before the grand jury is the testimony of accomplices, it cannot be said to be sufficient, if unexplained or uncontradicted, to warrant a conviction by the trial jury. *People* v. *Sweeney*, 213 N. Y. 37, 42.

These considerations lead me to the conclusion that the case against the defendant rests entirely upon the uncorroborated testimony of two accomplices and that the grand jury, therefore, was not justified in presenting the defendant for trial.

The motion of the defendant to set aside the indictment is granted, but with leave to the district attorney to resubmit the charges to the same or another grand jury.

Motion granted.

SYLVAN MORTGAGE CO., INC., Appellant, *v.* ALBERT M. STADLER, Respondent.

(Supreme Court, Appellate Term, First Department, February Term — Filed April, 1921.)

Landlord and tenant — pleading — when allegation of duress not sustained — Laws of 1920, chap. 136.

The authority of the judicial decisions that chapter 136 of the Laws of 1920 has no application to leases made prior to April 1, 1920, has not been affected by the decision in *People ex rel. Durham Realty Corp.* v. *LaFetra*, 230 N. Y. 429. (P. 313.)

While a two years' lease was still subsisting, the parties on March 25, 1920, entered into a new lease for a like term, to commence at the expiration of the old lease but at an increased rental. In an action to recover the first month's rent under the new lease the answer, besides alleging that the rent demanded was unjust and unreasonable, and that the agreement under

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which recovery was sought was oppressive, contained allegations to the effect that the new lease was executed under duress. *Held,* that a judgment in favor of defendant could be sustained only upon proof that he was entitled to be relieved of his obligations under the new lease because it was obtained by duress on the part of the landlord. (P. 314.)

In the absence of proof that the landlord could not have obtained from other persons the same rental as he exacted from defendant, or that he derived any special advantage from making a contract with defendant instead of with another, he was not even bound to first give defendant an opportunity to renew his lease upon any terms. (P. 316.)

Under the circumstances disclosed by the evidence, allegations of the answer to the effect that the new lease was executed under duress held not to have been sustained and the judgment in favor of defendant dismissing the complaint will be reversed and judgment directed for plaintiff for the amount claimed. (P. 320.)

APPEAL by the plaintiff from a judgment of the Muncipal Court of the city of New York, borough of Manhattan, fifth district, rendered after a trial without a jury, dismissing the complaint.

Herman C. Rubino (Franklyn M. Silverstein, of counsel), for respondent.

Katz & Levy (Charles Weishaupt, of counsel), for appellant.

Lewis M. Isaacs, *Amicus Curiæ,* on behalf of Apartment House Association, Inc.

LEHMAN, J. On March 25, 1920, the parties entered into a written agreement whereby the plaintiff leased to the defendant an apartment for the term of two years beginning October first, the date of the expiration of the term granted in a previous lease to the defendant. The rent reserved in the old lease was $1,300 per annum and under the terms of the new

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lease the defendant agreed to pay a rental of $2,500. The plaintiff now brings this action to recover the first month's rent payable under the lease of March 25, 1920. The answer alleges "that the rent to recover which this action is brought is unjust and unreasonable and that the alleged agreement under which the same is sought to be recovered is oppressive" and also contains allegations which are intended to show that the lease was executed under duress.

The learned trial justice has held that the defendant cannot interpose the defense authorized by chapter 136 of the Laws of 1920, that the rent is unjust and unreasonable and that the agreement under which the same is sought to be recovered is oppressive for the agreement in this case was made prior to the time when the statute went into effect, but he has given judgment for the defendant upon the ground that the lease was procured by duress.

The courts have hitherto decided that chapter 136 of the Laws of 1920 has no retroactive application to leases made prior to the 1st day of April, 1920. *Paterno Inv. Corp.* v. *Katz*, 112 Misc. Rep. 242; affd., without opinion, 193 App. Div. 897; *78th Street & Broadway Co.* v. *Rosenbaum*, 111 Misc. Rep. 577. The recent decision of the Court of Appeals in the case of *People ex rel. Durham Realty Corp.* v. *La Fetra*, 230 N. Y. 429, has not affected the authority of these cases. It is true that the Court of Appeals has held that the legislature had the power to take away the remedy of the landlord to enforce an expressed or implied obligation of the tenant to surrender possession at the expiration of the term, even though in a sense the obligation of a contract is thereby impaired, but it has not intimated that the provisions of chapter 136 of the Laws of 1920 were intended to be applicable to leases made before the passage of that act, or that the

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emergency conditions which the legislature has found existed would be in any wise relieved by giving that act a retroactive application.

It follows that the judgment in favor of the defendant can be sustained only if he has proven that he is entitled to be relieved of the obligations contained in his written agreement because that agreement was obtained by duress on the part of the landlord.

The defendant's evidence shows and the trial justice has held that on March 10, 1920, the defendant was notified, together with other tenants of the landlord, that the plaintiff required possession of their respective apartments on September 30, 1920, the date of the expiration of the leases under which they held possession. The defendant was informed that the landlord was ready to give him a new lease for a term beginning on that date at a rental of $2,500. The tenant objected to paying an increase of more than ninety per cent over the existing rent but he was informed that unless he signed a new lease, the landlord would rent the apartment to another tenant. The plaintiff allowed the defendant ten days to see whether he could obtain another apartment upon terms that would be more satisfactory but the defendant was unable to find other suitable apartments and thereupon signed the lease. At that time he was in ill health and feared that the landlord would compel him to leave the premises at the expiration of his original lease. The tenant took no steps to disaffirm the lease prior to October first, but merely refused to pay the rental in advance on October first when by the terms of the lease the first month's rental became due. Even at the trial he was unwilling to accept a cancellation of the lease and to make a promise that he would leave the premises within sixty days. No evidence was presented that the rent agreed upon in the lease was

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higher than the rental obtained from other tenants for similar apartments in the same neighborhood, but the plaintiff's counsel expressly conceded that there was a presumption that the rent was unreasonable and oppressive and there is evidence which shows that it was not based upon any calculation of a reasonable return upon the landlord's investment.

It would appear from the dissenting opinion in the case of *People ex rel. Durham Realty Corp.* v. *La Fetra, supra,* that the Court of Appeals was agreed that the defense of duress could not be sustained under such circumstances, but as the actual decision in that case was based upon the sufficiency of the pleadings and in any view of the case the pleadings in that case were insufficient I have preferred to consider the question anew as presented by the actual proof in this case.

In March, 1920, when the negotiations for the lease were initiated and the lease actually executed, the landlord had a legal right to inform the defendant that unless he signed a new lease at an increased rental he would rent the premises to a new tenant at the expiration of this tenant's lease. The threat express or implied that the landlord would exercise his lawful right to regain possession of the premises at the expiration of the term then in force, constitutes no duress, for duress can never be predicated upon a threat to enforce legal rights by lawful means. *McPherson* v. *Cox,* 86 N. Y. 472; *Dunham* v. *Griswold,* 100 id. 224. The learned trial justice recognized the authority of these decisions, but held that the duress in this case was not predicated upon the threat of the landlord to enforce his legal right to compel the tenant to surrender the apartment at the expiration of his existing term, but was based upon the helpless condition of the defendant in view of extraordinary condi-

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tions which prevented him from obtaining any apartment at a reasonable rate and the unconscionable conduct of the landlord in taking advantage of this condition to extort a lease which was actually oppressive. A court of equity will undoubtedly under proper circumstances relieve a party from a contract which has been extorted from him by unfair means and it is impossible to lay down any general rule as to the circumstances under which a court of equity will act which will apply to all cases. Before a court of equity, however, has any right to act, it must appear that the party seeking the relief did not wish to enter into such a contract but was in effect compelled to do so by some peculiar condition of hardship. In the present case the tenant did wish to enter into an agreement which he has made and the landlord did not compel him to do so. The tenant was well aware of the fact that owing to various economic causes there was a dearth of housing accommodations in the city of New York. He was at that time in possession of an apartment, but the law as it existed then did not recognize any prior right on his part to continue in that possession after the expiration of his lease. The landlord had the legal right to rent the apartment to another person at the expiration of the defendant's term. There is no proof, and it cannot be inferred, that the landlord could not have obtained from other persons the same rental as he exacted from this defendant or that he derived any special advantage from making a contract with this defendant instead of with some other willing person. Under these circumstances he was not even bound to give this defendant the first opportunity to renew his lease upon any terms. The defendant's necessities were no greater than those of thousands of other persons in this city. He was afraid that he might not find suitable accommodations unless he

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renewed his lease and to renew the lease he entered into an agreement from which he now seeks to be relieved. By his contract he obtained from the landlord exactly what he desired to obtain and secured for himself an advantage over other tenants in the city of New York. If the legislature had not subsequently enacted legislation which gave to all tenants in possession a right to continue that possession which they had not previously enjoyed, the defendant would never have sought to be relieved from his obligation or claimed that the agreement was obtained by duress. Even after the legislature made provision which at that time it considered adequate to relieve the conditions prevailing in the city of New York and which under certain circumstances gave the right to a tenant to remain in possession for a limited time after the expiration of his legal term, this defendant still did not make any attempt to disaffirm his agreement or to relinquish the advantages which he derived therefrom. Only after the legislature had passed the September rent laws which suspended the remedy of the landlord to regain possession of leased premises after the expiration of the term for which they were leased and thereby rendered the advantage over other tenants which this defendant had obtained by agreement of little value, did he repudiate his obligation. A court of equity will not relieve a promisor from his agreement merely because of changed circumstances which rendered the consideration received for the promise of less value.

I am unable to see how under these circumstances the claim of duress can be sustained. The landlord had the right to confer upon any party he desired a promise of possession of the premises at the expiration of the defendant's term. The law of supply and demand created a condition where the landlord could

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obtain for his promise of possession an unusually high consideration and he chose to demand in return for his promise the largest consideration which he could legally obtain. The tenant desired to obtain from the landlord the right to continue possession and in order to obtain this right he paid the unusually high consideration demanded. If the legislature had not thereafter enacted the rent laws it is possible that the landlord could on October first have obtained a far higher rental from another tenant and in that event this defendant would unquestionably have insisted upon his bargain. He speculated and speculated perhaps unsuccessfully upon the comparative advantage or disadvantage of making an agreement in advance for continued possession of a suitable apartment. The legislature has determined that the landlord's liberty to contract with whom he pleased and upon whatever consideration he could obtain, should be restricted to promote the public welfare because in the emergency which the legislature has found now exists, competition does not act as a sufficient corrective against demands for inordinately high rentals for living quarters in the city of New York but even though the court might find that the same unusual conditions existed at the time this contract was made as at the time that the legislature acted and that the remedy provided by the legislature for these conditions in September was economically sound and even that the legislature should have provided such remedies sooner, yet the court cannot without assuming a portion of the legislative police power, relieve this defendant from the obligation of a contract which was lawful when made and which gave to the defendant a right he desired to obtain, merely because the defendant, acting under a fear shared by thousands of other tenants, that unless he secured a right of future possession of a suitable

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apartment, he might thereafter be entirely unable to obtain such an apartment or unable to obtain it except at a prohibitive rate, agreed to pay a rent which, though higher than is necessary to afford the landlord a fair return on his investment, and higher than the landlord could obtain under normal conditions, is probably no higher than the landlord might have obtained from other persons at that time and certainly no higher than the defendant was willing to pay as long as the general fear continued in order to secure the advantage obtained from the contract. The legislature has exercised its power to relieve generally tenants in possession from the fear that they might not be able to continue in possession, unless they agreed to pay the rent demanded, by conferring upon them a right of continued possession upon terms it deemed proper, regardless of the desire of the landlord, but though a court of equity has power to adjust its remedies to meet new conditions when a wrong has been committed, its power is based upon the existence of a wrong which requires a remedy and it cannot relieve a party against the obligation of a contract, lawful when made, when such party entered into the contract knowingly and desired to retain the benefit derived from such contract until the legislature more than six months thereafter, in the exercise of its police power, conferred upon tenants in general a right to continue in possession upon terms more favorable than those which the landlord had a legal right to exact for his promise to give the tenant a right of continued possession. The only possible claim of compulsion on the part of the tenant was the fear that competitive conditions which might exist on October first would render it impossible for him to obtain a right of possession of a suitable apartment on that date; the purpose and the effect of the agreement was to give the tenant

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security of possession after October first. He sought, and for six months retained, an advantage over other tenants, actual or prospective, who had not made such an agreement and who therefore, on October first, might be competitors for the right to occupy apartments vacant on that date, and in its final analysis, the defendant's claim for relief is based upon the proposition that in spite of the fact that he was willing to enter into this contract in order to relieve himself from the fear that competitive conditions existing on October first would place him in a more unfavorable position and compel him to pay a larger consideration for an apartment if he had not secured one before that date, yet he should not be held to his obligation because the legislature four days before October first enacted statutes which protected other tenants against the effect of competitive conditions to which they would otherwise have been subjected.

Judgment should, therefore, be reversed, with thirty dollars costs and judgment directed for the plaintiff for the amount demanded in the complaint.

MULLAN and BURR, JJ., concur.

Judgment reversed, with thirty dollars costs.

MARBRIDGE BUILDING CO., INC., Respondent, v. JOSEPH A. WHITE, Appellant.

(Supreme Court, Appellate Term, First Department, February Term — Filed April, 1921.)

Landlord and tenant — summary proceedings — tenant holding over — damages — Code Civ. Pro. § 2253.

The tenant under a lease to begin upon the expiration of the term of a prior lease cannot maintain summary proceedings against the tenant in possession.

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In such circumstances, the landlord may maintain summary proceedings against the tenant holding over, and where he has secured a final order awarding him possession of the premises, the issuance of the warrant of removal does not prevent him from subsequently recovering by action under section 2253 of the Code of Civil Procedure the reasonable value of the use and occupation thereof, to the time when the warrant was issued.

The landlord's right of action for damages for breach of the tenant's covenant to surrender the premises at the expiration of the term, survives a summary proceeding for his removal, and where the lease with the second tenant specifically provides that the rent shall not be paid until possession is given, the plaintiff in the action is entitled to recover of the defendant, as for use and occupation, the rent called for by the second lease, while plaintiff was kept out of possession, but the counsel fee and expenses of the summary proceeding are not proper elements of damage in said action.

Mullan, J., dissenting.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, ninth district, in favor of plaintiff, after trial by the court without a jury.

Louis Dorfman (I. Balch Louis, of counsel), for appellant.

Stein & Salant (Joseph J. Cunningham, of counsel), for respondent.

LEHMAN, J. I agree with Mr. Justice Mullan that under the authority of *Livingston* v. *Robb*, 61 Misc. Rep. 81, the counsel fee and other expenses incurred in procuring defendant's removal are not proper elements of damage in an action for breach of the defendant's covenant to surrender the demised premises at the expiration of defendant's term but in my opinion the plaintiff is entitled to recover the value of the use and occupation of the premises.

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The case of *United Merchants Realty & Improvement Co.* v. *Roth,* 193 N. Y. 570, established the rule that "a new lessee, whose lease begins at the termination of a prior lease, can at his option, treat the prior lessee in case he holds over, as his tenant under the terms of the original lease." In the subsequent case of *Eells* v. *Morse,* 208 N. Y. 103, the court however decided "that a landlord can maintain summary proceedings to remove a tenant holding over after the expiration of the term, although he has made a new lease of the premises to begin upon the expiration of the term of the tenant in possession, and that the tenant under the new lease cannot maintain such proceedings. (Cases cited.) The landlord has the remedy under such circumstances, because he has the right of possession as against the tenant holding over (*Whiting* v. *Edmunds,* 94 N. Y. 309), and the tenant cannot be heard to say otherwise. The second tenant does not have the remedy against the prior tenant because it is given only in cases where the conventional relation of landlord and tenant exists between the parties (*Benjamin* v. *Benjamin,* 5 N. Y. 383; *People ex rel. Mitchell* v. *Simpson,* 28 N. Y. 55) and such relation does not exist between the two tenants." In accordance with the rule laid down in that case the plaintiff has secured a final order against the prior tenant awarding to him possession of the premises. The issuing of the warrant for the removal of the tenant from the demised premises under the final order "does not prevent the landlord from recovering by action * * * the reasonable value of the use and occupation thereof to the time when the warrant was issued" (Code Civ. Pro. § 2253) and the right of action for damages caused by the breach of the prior tenant's covenant to surrender the premises at the expiration of his term survived the summary pro-

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ceedings. See *Livingston* v. *Robb,* 61 Misc. Rep. 81; *Vernon* v. *Brown,* 40 App. Div. 204; *Phelan* v. *Kennedy,* 185 id. 749.

The final order in the summary proceedings hitherto brought by the plaintiff constitutes an adjudication that as between this plaintiff and this defendant the plaintiff was entitled to the possession of the demised premises and even without such adjudication, it is well established "that the tenant cannot be heard to say otherwise." *Eells* v. *Morse, supra.* The plaintiff in this case having the right of possession as against the defendant holding over under his lease, must legally be entitled to recover for the use and occupation while he was kept out of such possession and since he was undoubtedly damaged in the amount of the rental which the second tenant was, under the terms of his lease, not required to pay to the plaintiff until possession of the premises was given to the second tenant, the plaintiff herein has the right to recover the amount of these damages against this defendant. *Phelan* v. *Kennedy, supra.*

On the other hand since the relation of landlord and tenant does not exist between the two tenants, it is evident that the second tenant cannot recover against the prior tenant for use and occupation and has not been damaged by the tenant's failure to surrender possession of the premises without summary proceedings, for by the terms of his lease he specifically provided that rent under his lease "shall not begin until possession of the space is given or available."

The Court of Appeals in the case of *Eells* v. *Morse, supra,* has pointed out that its prior decision in the case of *United Merchants Realty & Improvement Co.* v. *Roth, supra,* is not in conflict with the rules of law which I have cited above and which, in my opinion,

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establish the right of the present plaintiff to recover against this defendant for the use and occupation of the premises for the period during which the defendant held over. Moreover since the lease between the plaintiff and the second tenant specifically provides that the rental shall not be paid until possession of the premises is given, and the landlord and not the new lessee is "thus subjected to all the inconveniences and damage occasioned by the holding over," the ground for the decision arrived at by the Court of Appeals in the case of *United Merchants Realty & Improvement Co.* v. *Roth, supra,* that the second tenant is entitled to the rights of a grantee provided for in section 193 of the Real Property Law is lacking in this case.

Judgment should, therefore, be reduced to the sum of fifty-six dollars and sixteen cents, with appropriate costs in the court below and as modified affirmed, without costs to either party.

MULLAN, J., dissents.

MULLAN, J. (dissenting). The plaintiff, owner of a business building, leased a room in it to defendant, for a term expiring May 1, 1920. The defendant having failed to vacate upon the expiration of that term, the plaintiff caused his removal by means of summary proceedings, and thereafter brought this action for damages for the wrongful withholding of possession, and has recovered a sum representing the value of the use of the premises during the over-stay twelve days — and the counsel fees and disbursements necessarily paid in and for the summary proceeding. I am of the opinion that the judgment cannot be sustained.

The counsel fees and other expenses incurred in procuring defendant's removal are not proper ele-

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ments of damage. *Livingston* v. *Robb*, 61 Misc. Rep. 81.

Prior to the expiration of defendant's lease, the plaintiff had leased the room to Miller, the latter's term to commence on May 1, 1920, when, as has been said, defendant's term came to an end. Miller, after having been kept out of possession for the twelve-day period referred to, then entered. The learned trial justice correctly held that Miller would ordinarily have had the right to sue defendant for use and occupation for the twelve-day period, while plaintiff would ordinarily not have had that right (*United Merchants' Realty & Improvement Co.* v. *Roth*, 193 N. Y. 570); but he was of the opinion that a certain provision in plaintiff's lease to Miller took that right from Miller and gave it to, or left it in, plaintiff. The provision reads: "If possession of the space covered by this lease cannot be given on or before the date of the commencement of the term, rent under this lease shall not begin until possession of the space is given or available, and such allowance of rent shall be received by the tenant in full settlement for any claims which the tenant might otherwise have by reason of said space not being ready on said date." The lease was a formally prepared instrument, and in it the beginning of the term to Miller was very plainly fixed to occur on May 1, 1920. It seems to me to be very clear that it was the intention of plaintiff and Miller, in inserting the clause quoted, merely to release Miller from the obligation to pay rent for any period during which he might, for any reason, be unable to procure possession. The lease took effect on May 1, 1920, and from that moment Miller had all the rights of a lessee. The plaintiff was not required to put him in possession. *United Merchants' Case, supra.* Miller did not wish to pay the rent for a period during which he might be kept out of possession, and the provision in

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question — a not uncommon one — was quite evidently designed to accomplish the purpose of enabling Miller to escape the payment to plaintiff of rent until he should have procured possession, and I think it should be given no further effect. Although the point is, of course, not directly before us for decision, it seems to follow that I am of the opinion that Miller may recover from defendant for the value of the twelve-day period.

My brethren hold the view that section 2253 of the Code of Civil Procedure gives a right to the plaintiff to recover for the use of the twelve-day period despite the holding in the *United Merchants'* case. I have never fully understood the reasoning of the majority in that case, but the holding itself seems to be clear enough, and most certainly allows the new tenant to sue the old tenant for rent. It is true that subsequently, in the *Eels* case, the Court of Appeals held that the new tenant was not such a landlord to the old tenant as was referred to in the summary proceeding statute. It may be difficult to reconcile the reasoning upon which the holdings in those two cases rest, but the actual holdings are plain and not in conflict. I think, therefore, that taking, as we must, the law as we find it, section 2253 of the Code of Civil Procedure should be read as meaning merely that a lessor *who is entitled* to rent from a dispossessed lessee is not barred from recovering it because the lessor caused the lessee's dispossession; and that it would not be read as giving to the lessor a right that the Court of Appeals said, in the *United Merchants'* case, belonged exclusively to the new lessee.

I vote to reverse, and for a dismissal of the complaint upon the merits.

Judgment modified, and as so modified affirmed, without costs.

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WALDO I. SHUMAN and Another, Appellants, v. IVAN GOLDSMITH and Another, etc., Respondents.

(Supreme Court, Appellate Term, First Department, March Term — Filed April, 1921.)

Stock brokers — selling out under the rules — damages.

On a Saturday, the day after a sale of certain securities by plaintiffs, members of the New York Stock Exchange, to defendants, who are not, a confirmation of the sale was received from defendants, at the foot of which appeared the following: "All transactions involving the purchase or sale of securities are made by us subject to the rules and customs of the Exchange and with the distinct understanding that actual delivery is to be made." Defendants requested plaintiffs, as matter of accommodation, to deliver the securities to a certain trust company. No delivery was made on the following Monday or on the next day, which was a holiday, and when on Wednesday the securities were tendered to the trust company they were refused, and, upon being sold out for defendants' account, in accordance with the rules of the stock exchange, there was a loss to plaintiffs. The relevant rule of the Exchange was to the effect that when a delivery is not made in time, the purchaser may not take advantage of the seller's default until after giving notice of intention to "close the contract," which notice it was conceded had not been given by defendants. *Held*, that in an action for defendants' failure to accept the securities, plaintiffs were entitled to judgment for the difference in the market value of the securities.

A contention of defendants that a previous decision of this court in which it was held that in an action in which the defendants herein sued the trust company upon a corresponding liability with that sought to be enforced in the present case, the notice at the foot of defendants' confirmation of the sale, regarding the applicability of the rules of the Stock Exchange, was not a part of the contract between the parties to that suit, was controlling in the present action, was untenable, and a judgment directed in favor of defendants in the present action will be reversed with costs, and judgment directed for plaintiffs in the full amount claimed, with costs in the court below.

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APPEAL by plaintiffs from a judgment of the Municipal Court of the city of New York, borough of Manhattan, first district, in favor of defendants, after a trial by a judge without a jury.

Harry R. Kohn, for appellants.

Paskus, Gordon & Hyman (Julian T. Abeles, of counsel), for respondents.

LYDON, J. Plaintiffs sue for loss sustained by them (being the difference in the market price) for failure of defendants to accept delivery of certain securities sold by plaintiffs to the defendants. The sale was concededly made on March 21, 1919, which was a Friday. A comparison slip (as it is called, being really a memorandum of the sale) was sent by plaintiffs to defendants and stamped by defendants on the same day. On the following day — a Saturday — a confirmation was received from defendants at the foot of which appeared an inscription: "All transactions involving the purchase or sale of securities are made by us subject to the rules and customs of the Exchange and with the distinct understanding that actual delivery is to be made." Defendants requested plaintiffs as a matter of accommodation to deliver the securities to the Italian Discount and Trust Company. No delivery was made on Monday, March twenty-fourth; Tuesday, March twenty-fifth, was a holiday because of the parade of the Twenty-seventh Division upon their return from France, and when the securities were tendered to the Italian Discount and Trust Company on Wednesday, March twenty-sixth, they were refused. Thereupon plaintiffs pursued the course provided in the rules of the Stock Exchange of selling the securities out for defendants' account resulting in the difference of price or loss herein sued for.

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Plaintiffs are members of the New York Stock Exchange, defendants are not.

One of the plaintiffs' witnesses testified without contradiction that it is the custom "that all tradings in Wall street between the members of the New York Stock Exchange and nonmembers are subject to the rules of the New York Stock Exchange." The only objection taken to this testimony was on the part of defendants' counsel: "I object to that. He is indirectly trying to prove the rules of the Stock Exchange. There is nothing brought to our notice of any rules." I do not understand the objection, but in view of the inscription concededly appearing on the defendants' confirmation slip, it is perfectly clear that the defendants both knew the rules and regarded the transaction as subject thereto, so that we have the unexplained, and as I understand it, conceded fact that defendants expressly notified plaintiffs that the rules of the Stock Exchange governed this transaction, and the uncontradicted fact that such was the custom as applied to this transaction. The relevant rule of the Exchange is to the effect that where a delivery is not made in time the purchaser could not take advantage of the seller's default until after giving notice of intention to "close the contract," which notice it was conceded had not been given by defendants.

There being no dispute as to the facts in the case, it would seem to be clear that the plaintiffs were entitled to the judgment. Defendants, however, on the trial and upon this appeal, contend that the case is controlled by a previous decision of this court made under the following circumstances. The defendants here sued the Italian Discount Company upon a corresponding liability with that sought to be enforced in the instant case. Upon appeal to this court it was

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held that the notice at the foot of defendants' confirmation regarding the applicability of the rules of the Stock Exchange was not a part of the contract between the defendants here and the Italian Discount and Trust Company, upon the authority of *Poel* v. *Brunswick-Balke Collender Co.*, 216 N. Y. 310.

It is also urged by the defendants that since the same evidence was given by the same witnesses in the other case the decision on the appeal therefrom governs this case. It seems to be perfectly clear that no such conclusion can possibly follow, but that the contrary is manifestly true. The testimony of the custom in the case in which the present defendants were plaintiffs (if indeed any such testimony was given) was utterly irrelevant because it applies only where one of the contracting parties is a member of the Exchange. In the next place, it was held on the previous appeal that the mere appearance of an inscription on a paper sent by the plaintiffs there to the defendants there did not become a part of a contract between those two parties without evidence that the defendants there so understood. In the instant case the inscription on defendants' confirmation slip is at the very least an admission on defendants' part, and since plaintiffs have proved the custom which bound them as well as the defendants to the same effect as defendants' admission on the slip, we have conclusive evidence that the contract in the instant case was made with reference to that custom.

Judgment reversed, with $30 costs of this appeal, and judgment for $264 in favor of plaintiffs, with appropriate costs in the court below.

Judgment reversed, with thirty dollars costs.

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PEOPLE OF THE STATE OF NEW YORK ex rel. THEODORE THOMSEN, Relator, v. COMMISSIONER OF CORRECTION, NEW YORK CITY, et al., Respondents.

(Supreme Court, Kings Special Term, April, 1921.)

Statutes — how far Eighteenth Amendment to the Constitution of the United States and the Volstead Act abrogate state statutes — habeas corpus — Laws of 1920, chap. 911.

The Eighteenth Amendment to the Constitution of the United States and the Volstead Act do not abrogate previously existing state statutes relative to trafficking in liquor, except in so far as they may be in open and direct conflict with the federal statutes. (P. 335.)

All provisions of state laws which tend fairly to the enforcement of said amendment and are not in direct conflict with the Volstead Act, remain unimpaired and may be enforced by the state courts. (Id.)

The statute (Laws of 1920, chap. 911) relating to trafficking in "all distilled and rectified spirits, wine, fermented and malt liquors containing at least one-half of one per centum of alcohol by weight," though not altogether in harmony with the so-called Volstead Act, is void only in so far as it conflicts with the federal statutes. (P. 337.)

All those provisions constituting the greater portion of said statute of 1920 and which authorize the granting of a liquor tax certificate for the sale of liquor containing more than one-half of one per cent of alcohol and not more than two and seventy-five hundredths per cent, violate the Federal Constitution, and any liquor tax certificates issued thereunder are void. (Pp. 337, 338.)

Where certain declarations within the body of said statute of 1920 show a legislative intent to give effect to the Eighteenth Amendment of the Federal Constitution and to absolutely prohibit the sale for beverage purposes of liquor deemed intoxicating, the court is justified in inferring that such was the dominating intent of the legislature; that the provisions authorizing the sale of liquors containing not more than two and seventy-five hundredths per cent of alcohol were subsidiary to the main purpose of the statute, so that even with the unconstitutional

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provisions exscinded, the legislature would still have passed the act. (P. 339.)

Section 8 of said statute of 1920 which though providing for excise taxes on trafficking in liquors makes no provision for the sale of liquor to be drunk on the premises except, in a city of the first or second class, in a restaurant where meals are furnished. *Held*, that as no license could legally be obtained under the statutes to sell, in such a place, liquor of any degree of alcoholic content, said section was separable from and independent of the statutory purpose to permit, under certain restrictions, the sale of so-called non-intoxicating liquors containing up to two and seventy-five one-hundredths per cent of alcohol. (P. 340.)

An information charging relator with a violation of the statutes of 1920 is not defective because the alcoholic content of the whiskey alleged to have been sold by him was not set forth and upon a traverse to the return to a writ of habeas corpus sued out by relator pending a hearing upon the informa tion before a magistrate he will be remanded. (Pp. 340, 341.)

TRAVERSE to return to writ of habeas corpus.

Charles E. Russell, for relator.

Harry E. Lewis, district attorney (Harry G. Anderson, assistant district attorney, of counsel), for respondents.

BENEDICT, J. This case comes before me upon a traverse to the return to a writ of habeas corpus heretofore issued herein. Relator was arrested for a violation of chapter 911 of the Laws of 1920, relating to trafficking in liquors. The writ was granted pending the hearing before a city magistrate. On behalf of the relator it is urged that the information does not charge any crime against defendant because the alcoholic content of the beverage alleged to have been sold by defendant is not set forth, and because the effect of the decision of the Supreme Court of the United States in the *National Prohibition Cases*, 253 U. S. 350, was

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to render chapter 911 of the Laws of 1920 void *in toto*. That act defines liquors as "all distilled or rectified spirits, wine, fermented and malt liquors containing at least one-half of one per centum of alcohol by weight." Intoxicating liquors are defined as those containing more than two and seventy-five one-hundredths per cent of alcohol by weight, and non-intoxicating beverages as those containing not more than two and seventy-five one-hundredths per cent of alcohol by weight. § 2. The scheme of the act was to require payment of a tax and the issuance of a liquor tax certificate in order to obtain authority to sell liquors having one-half of one per cent of alcohol and not more than two and seventy-five one-hundredths per cent. Any person who traffics in liquors "without having lawfully obtained a liquor tax certificate" is guilty of a misdemeanor and subject to fine and imprisonment. § 36, subd. 1.

The charge against defendant stated in the information is that on January 18, 1921, he "did unlawfully * * * traffic in liquors without having secured a liquor tax certificate," and it is further alleged that the informer saw "three glasses of whisky" sold by relator to three men, one of whom paid for the same.

The case thus presents a question which, so far as I am informed, has not as yet been determined in this state or elsewhere, namely, whether an act in relation to traffic in liquors passed since the enactment of the so-called Volstead Act and not altogether in harmony therewith is void *in toto* or only void in so far as it conflicts with the federal statute. This involves a consideration of the meaning of the term "concurrent power" as used in the Eighteenth Amendment to the Federal Constitution, concerning which a great deal of confusion has arisen. Such confusion seems to me to have been wholly unnecessary, for the proper con-

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struction of the constitutional provision is a simple matter. Obviously congress is under a duty to enforce the Eighteenth Amendment. The states are under no duty in this respect, but have the privilege, which they may accept or reject at pleasure, of passing acts for that purpose. If any state government elects to remain inactive, its officers and its courts will take no part in the enforcement of the amendment. A state may enact a law which is more or less stringent than the enforcement act of congress. No state can, of course, render lawful, so far as the federal government is concerned, any act proscribed by the federal law, but if the state law be less stringent than the federal law, the state officials will not take cognizance of, and state courts will not punish, acts which are not forbidden by the state law although they may be violations of the federal law. Thus, if the state law declare beverages containing two and seventy-five one-hundredths per cent of alcohol to be non-intoxicating and do not in any way forbid the sale thereof, a person selling a beverage containing that percentage or less of alcohol cannot be prosecuted in the state courts, although he may be in the federal courts, if he sell, within the limits of such state, a beverage containing more than one-half of one per cent of alcohol. But, of course, a state government cannot now grant a license to sell liquor containing more than one-half of one per cent of alcohol, notwithstanding that a state statute may in terms authorize the granting of such license. In other words, the state officials are not authorized to take any affirmative action which would tend to violation of the federal statute, but neither will they take action not authorized or commanded by the state statute. Acts falling within the limbo, so to speak, between the

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federal and state statutes can only be prosecuted by federal officials and punished by federal courts.

It has been generally recognized that the Eighteenth Amendment and the Volstead Act did not have the effect of abrogating the previously existing state statutes relative to trafficking in liquors, except in so far as the state acts may be in open and direct conflict with the federal statute. All provisions of the state laws which tend fairly to the enforcement of the Eighteenth Amendment and are not in direct conflict with the Volstead Act remain unimpaired and may be enforced by the state courts. This has been settled by the authorities in several jurisdictions. Probably the most notable case is *Commonwealth* v. *Nickerson*, 128 N. E. Repr. 273, in which the Supreme Judicial Court of Massachusetts in an elaborate opinion by Chief Justice Rugg, held that the liquor law of that state was not abrogated in its entirety by the Eighteenth Amendment and the Volstead Act, but that so far as it was not in conflict with the amendment and the federal act the state act was valid and in force, and hence that a prosecution could be maintained thereunder for selling liquor without a license, although on account of the amendment and the federal act no license could be issued by the state authorities. To the same purport are *Ex parte Guerra*, 110 Atl. Repr. 224, dealing with the effect of the wartime prohibitory act of congress, and *State* v. *Fisher*, 111 id. 432. In *People* v. *Foley*, 113 Misc. Rep. 244, the precise question now before the court was passed upon by Justice Tuthill of this court, sitting in Tompkins county, to the extent that the court in dismissing an indictment found under the former Liquor Tax Law, because that law had been superseded by chapter 911 of the Laws of 1920, directed that the matter be again submitted to the

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grand jury under the latter act. Mr. Justice Tuthill quotes from a charge delivered by Chief Justice Gummere of New Jersey to a grand jury, in which the latter said in substance that the liquor law of New Jersey as in existence when the Eighteenth Amendment and the Volstead Act became effective, remained in force except those provisions relative to the granting of a license, so that it became by virtue of the amendment and the federal legislation an absolute prohibitory act. Reference may also be had to notes in 34 Harvard Law Review, 317 (see N. Y. L. J., Jan. 25, 1921, p. 1410) and 19 Michigan Law Review, 329 (N. Y. L. J., Feb. 5, 1921, p. 1554).

The question here presented differs from that presented in any of the cases above mentioned except *People* v. *Foley, supra,* in that the New York statute under consideration was enacted since the amendment and the Volstead Act, and so the doctrine stated by Chief Justice Rugg in *Commonwealth* v. *Nickerson, supra,* must be considered. He said: " This point is not the same which would arise where a whole statute has been enacted, some parts of which are beyond legislative power under then existing constitutional provisions. In such cases one part of the statute may be valid and enforceable and another part obnoxious to some constitutional inhibition, subject to ' this limitation: That the parts so held respectively constitutional and unconstitutional must be wholly independent of each other. But if they are so mutually connected with and dependent on each other, as conditions, considerations and compensations for each other, as to warrant a belief that the Legislature intended them as a whole, and that, if all could not be carried into effect, the Legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent,

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conditional or connected, must fall with them.'" P. 282.

There is no question but that the doctrine thus stated has the support of the authorities in this and other states. *Hauser* v. *North British & Mercantile Ins. Co.*, 206 N. Y. 455, 465, affg. 152 App. Div. 91, 95; *People* v. *Harrison*, 170 id. 802, 811; *Daly* v. *Garven*, 90 N. J. L. 512; *Agricultural Society* v. *State*, 130 Md. 474; *Snetzer* v. *Gregg*, 129 Ark. 542, 548. In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565, the Supreme Court of the United States, by Mr. Justice Harlan, referring to a statute one section of which had been held to be unconstitutional, said: "But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative." As chapter 911 of the Laws of 1920 was enacted subsequent to the Eighteenth Amendment and the Volstead Act, and is in its interpretation of the amendment to some extent in direct conflict with the Volstead Act—that is as to what percentage of alcoholic content makes a liquor intoxicating—can it be upheld as valid in so far as it is not in conflict with the federal statute? In other words, can we say that the legislature would have enacted the remaining parts of the act if the offending portion had been struck out? The offending portion in the act in question comprises all those provisions which authorize the granting of a liquor tax certificate for the sale of liquor containing more than one-half of one per cent of alcohol, and not more than two and seventy-five one-hundredths per cent, which provisions constitute by far the greater portion of the law. The state authorities, now being apprised by the decision in *National Prohibition Cases, supra*, that these provisions of the act are void

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under the Federal Constitution, will, of course, issue no more liquor tax certificates, and presumably any certificates which they may have issued under the act are void. The act is thus made to operate as an absolute prohibition against the sale of all beverages containing more than one-half of one per cent of alcohol, because beverages containing a higher percentage of alcoholic content up to two and seventy-five one-hundredths per cent cannot be sold without a liquor tax certificate, and no liquor tax certificate can now be obtained. That is clearly not the result intended by the legislature.

If we were to stop here, it would follow under the authorities above cited that the entire act of 1920 is void, and hence that the information conferred no jurisdiction on the magistrate to hold the relator. The act contains, however, certain declarations indicative of a legislative intent which might not be inferable from its provisions apart from such declarations. The title reads as follows: "An Act prohibiting the manufacture, sale, transportation, importation, and exportation of intoxicating liquors for beverage purposes, providing a penalty therefor, in relation to traffic in certain non-intoxicating beverages, and amending the liquor tax law and adapting the provisions of such chapter to conform to the eighteenth amendment to the Constitution of the United States."

The introductory portion of section 8 reads as follows: " To enable the state to so regulate the traffic in liquors that only non-intoxicating liquors may be trafficked in for beverage purposes, and to protect the public from abuses of the privilege of trafficking in intoxicating liquors for any purpose, and otherwise to aid in the enforcement of the eighteenth amendment to the United States constitution, excise taxes upon

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the business of trafficking in liquors shall be assessed as follows:" etc.

In section 9-A, imposing a tax on the manufacture and distribution of liquors, it is stated that the purpose is "to accomplish the objects stated in section eight, and to confine the production and distribution of liquors to purposes which are lawful under this chapter and the constitution of the United States."

These declarations show a legislative intent to give effect to the Eighteenth Amendment of the Federal Constitution, and to prohibit altogether the sale for beverage purposes of liquor deemed intoxicating and they justify the court in inferring that this was the main or dominating intent of the legislature, and that the provisions authorizing the sale of liquors containing more than one-half of one per cent and not more than two and seventy-five one-hundredths per cent of alcohol, were subsidiary to the main purpose of the act, so that, even with the unconstitutional provisions exscinded, the legislature would still have passed the act. In *Agricultural Society* v. *State, supra,* a statute of Maryland forbade gambling on horse-races except races at agricultural fairs, upon the grounds licensed for the purpose by the circuit court of the county where the grounds were located. The provision for licensing such organizations was claimed to be unconstitutional because it imposed on the courts a non-judicial duty; but it was held that even if such provision were unconstitutional the validity of the remainder of the act was not thereby affected. This case lends some support to the contention that chapter 911 of the Laws of 1920 is valid in its prohibitory measures, although no license can now be issued thereunder for the sale of beverages therein classified as non-intoxicating.

If, however, I am wrong in concluding that all the

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provisions of the act of 1920 not in direct conflict with the Eighteenth Amendment and the Volstead Act are operative, I find one provision which seems to be so separable from the rest of the act as to stand alone. Section 8, above referred to, which provided for excise taxes on trafficking in liquors, makes no provision for the sale of liquors to be drunk on the premises except in a city of the first or second class in a restaurant where meals are furnished and having no bar except a service bar for employees, and then only to guests of the restaurant with their meals (Liquor Tax Law, § 8, subd. 5), and it is made unlawful to sell liquor to be drunk on the premises except in conformity with such provision. § 30, subd. A. The purpose of the legislature seems to have been to abolish the institution known as the saloon, where the sole or main object is the sale of liquor and where a person may procure liquor and nothing else if he desire. No license could be obtained under the act of 1920 to sell liquor of any degree of alcoholic content in such a place. This provision of the legislature, therefore, seems to be separable from and independent of the purpose to permit, under certain restrictions, the sale of so-called non-intoxicating liquors containing up to two and seventy-five one-hundredths per cent of alcohol. The information permits the inference that the liquor in question was sold under such circumstances that the sale was in violation of these provisions.

The second objection, that the information is defective in not stating the percentage of alcoholic content of the beverage sold by defendant, is untenable. The word "whisky" has a well defined meaning as an alcoholic beverage containing a large percentage of alcohol. No liquor containing two and seventy-five one-hundredths per cent or less of alcohol could properly be called whisky. The Eighteenth Amendment to

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the Federal Constitution and the Volstead Act have not, as yet at least, changed the ordinary significance of words. Hence, I find no defect in the information in that it did not set forth the alcoholic content of the beverage alleged to have been sold.

Relator remanded.

NEW YORK MUNICIPAL RAILWAY CORPORATION, by LINDLEY M. GARRISON, as Receiver, Plaintiff, *v.* INTERCONTINENTAL CONSTRUCTION CORPORATION, GLOBE INDEMNITY COMPANY et al., Defendants.

(Supreme Court, Kings Trial Term, April, 1921.)

Contracts — breach of — when surety not released.

Where an obligee has been guilty of acts and omissions in the performance of the contract of its obligor, which may be to the prejudice of the surety, the latter is only released to the extent of its actual damage, but this rule is subject to limitations not applicable to the present case. (P. 345.)

A building contract provided: "In order to assist the contractor to prosecute the work advantageously the engineer shall, from time to time, as the work progresses, but not oftener than once a month, make in writing an estimate — when such estimate shall be approved by the engineer, ninety per cent of the amount stated therein shall be paid by the company to the contractor on or before the 20th day of the month following that for which the estimate is rendered." Weekly payments made during May, June and July for the work actually done and materials furnished to the extent of ninety per cent of the contract, were deducted from the monthly estimate for each of those months at the time when payment on the monthly estimate was rightly made. Between the first and the twentieth of June, July and August, monthly estimates as provided for by the contract were made and the contractor was paid that monthly estimate less the amount of the weekly payment. Similar weekly payments were made during August and though before the estimate for that month was made the contractor had

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defaulted, it was paid the amount of the estimate for August, less the weekly payments made during that month. *Held*, that it appearing in an action for damages against the contractor and its sureties for faithful performance of the contract the sureties had suffered no actual damage they were not released by the weekly payments made in May, June and July. (Pp. 343–345.)

The contractor having defaulted before the monthly estimate for August had been made, plaintiff never became obligated to make any payment for that month and to the extent that he did make such payment, the sureties cannot be charged. Neither could any payment made to the contractor after his default be charged against the sureties. The deduction, therefore, of all of the payments from plaintiff's conceded damages would make no difference in the result to the sureties because of their limited responsibility. (P. 346.)

The bond of each of the sureties was $50,000, and one of them, a corporation in the hands of a foreign receiver, pleaded as a defense that a payment of $30,000 to complete the contract, paid out of retained percentages, which was a security for the surety, was made without its consent. *Held*, that while to the extent of such payment, the surety was discharged, its liability on its bond remained unaffected, even conceding that such payment and said surety's share of the full amount of the weekly payments were not all properly made. (P. 347.)

The action was rightly brought against said surety, in this state, and judgment may be properly entered against it. (Id.)

ACTION for damages for breach of contract and to recover upon surety's bond.

George D. Yeomans (Charles L. Woody, of counsel), for plaintiff.

Frederick L. Keating, for defendants.

James I. Cuff, for defendant New England Equitable Insurance Company.

LAZANSKY, J. Action for damages against defendant contractor for failure to complete the work provided for under the contract, and against the defendants surety

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companies on their bonds for the faithful performance of the contract by the contractor — each defendant in the sum of $50,000. The defendants surety companies defend on the claim that they are discharged from their obligations because plaintiff instead of making monthly payments to the contractor on monthly estimates, as provided for by the contract, during certain months preceding the contractor's default made weekly payments to it. Defendant New England Equitable Insurance Company defends on the further ground that as to it, the time for the completion of the contract was extended and $30,000 were paid out of retained percentages without its consent. The contract provides: "In order to assist the contractor to prosecute the work advantageously the engineer shall, from time to time, as the work progresses, but not oftener than once a month, make in writing an estimate — when such estimate shall be approved by the engineer, ninety per cent of the amount stated therein shall be paid by the company to the contractor on or before the 20th day of the month following that for which the estimate is rendered." During the months of May, June, and July, instead of making the payments provided for by the contract, plaintiff made payments by the week for the work actually done and materials actually furnished, to the extent of ninety per cent thereof. Between the first and the twentieth of June, July, and August, the monthly estimates were made as provided for by the contract, and the contractor was paid that monthly estimate, less the amounts paid weekly, as above stated. Similar weekly payments were made during the month of August. But before the monthly estimate for that month was made, the contractor defaulted, and after his default he was paid the amount of the monthy estimate for the month of August, less the weekly payments made during

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August. The question is are the surety companies discharged because of these weekly payments? No actual damage to the sureties has been shown by these indulgences of plaintiff to the contractor. The sureties, however, contend it is not necessary to show that there was damage; all that must be shown is that the sureties *may* have been damaged. They claim that here, by giving the contractor advance payments, his incentive to finish the job was blunted and for that reason the sureties were prejudiced and are therefore discharged.

It is well settled that where the contract between the principal and obligee is altered the surety is, as it is expressed, "released" whether or not he is damaged. I doubt the accuracy of the term "released." Would it not be more accurate to say that where the contract has been altered, the surety is not liable because he was not a party to such a contract? *Non hæc in fœdera veni.* Such is the case where a valid extension of time to pay the debt is given by a creditor to his debtor without the surety's consent. *Merrill* v. *Reiners,* 14 Misc. Rep. 583. Of course, in such case, it is not necessary to show damage. It has also been held (*Smith* v. *Molleson,* 148 N. Y. 241) that where the obligee by some act or omission, not an alteration of the contract, prejudices the rights of the surety, the latter is released. It seems to me this is too broad a statement and not strictly accurate. It is applicable to the cases cited in *Smith* v. *Molleson.* In the New York cases cited to support the proposition, it appears that the obligee by his act released the principal from his obligation, and it necessarily followed that the surety was released. In the often cited case of *Calvert* v. *London Dock,* 2 Keen, 638, cited in *Smith* v. *Molleson,* the obligee made payments out of what was considered security in excess of his damage by

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reason of the principal's breach of the contract, and since the surety is subrogated to the benefit of the security, under the circumstances of that case he was released. It is not the law of this State that every act or omission of the obligee in the performance of the contract prejudicial to the surety releases the latter. In *Vose* v. *Florida R. Co.*, 50 N. Y. 369, it was said that where the obligee meddled with the security contrary to the contract, the surety is only discharged to the extent of the value of the security. It seems to me that the correct rule to be applied generally where the obligee has been guilty of acts and omissions in the performance of the contract which may be to the prejudice of the surety, is the surety is only released to the extent of his actual damage. This rule may be subject to limitations which have no application to this case. It is not necessary to consider them. To decide this case is sufficient. While a different rule has been applied in other jurisdictions, my attention has been called to no authority in this state requiring me to hold otherwise. Since, therefore, it appears that the surety has not suffered any actual damage, I must hold that the surety is not released by the weekly payments made in May, June and July. I so decide without considering the effect of a tendency of the courts to deal less favorably with sureties for hire than with voluntary sureties. *St. John's College* v. *Ætna Indemnity Co.*, 201 N. Y. 335, 342. The weekly payments for May, June, and July were deducted from the monthly estimates for each of those months at the time when payment on the monthly estimate was rightly made. In that way the contractor finally received that to which he was entitled—part payment having been made in advance. Assuming, however, that these weekly payments were

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prejudicial to the sureties to the extent thereof, if the total of them (about $92,000, including August) were deducted from the conceded damage (over $495,000), there would be still over $400,000 of damage to plaintiff, which, divided into four parts, would make over $100,000 for each of the surety companies, whose liabilities are limited to $50,000 each. The contractor defaulted before the monthly estimate for the month of August had been made. The company, therefore, never became obligated to make any payment for the month of August, and to the extent that it did make such payment the sureties cannot be charged. Plaintiff also had no right to make any payment to the contractor after its default and cannot charge that payment against the sureties. But a deduction of these payments and the other weekly payments from the plaintiff's conceded damage would make no difference in the result to the sureties, because of their limited responsibility. If I be wrong in my conclusion, it seems to me that the same result would be reached by applying the rules that seem to be laid down in *St. John's College* v. *Ætna*, 201 N. Y. 335: (1) That these payments were not advances, but loans, although they are characterized as advances by plaintiff. (2) The weekly payments were very small in light of the work being done; they were needed by the contractor, who was hard pressed for funds; they were for work and materials actually placed in the job and within the retained percentage provision of the contract and it would therefore work a practical injustice to hold that the surety companies were discharged. See, also, *Elmohar* v. *Phillips*, 188 App. Div. 100. As to the claim of the New England Company that it is discharged because of an extension of time to complete the contract, amounting to $30,000, it appears that the contract provides for an extension of time without the

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consent of the sureties. As to the claim of discharge by reason of the payment of $30,000 out of retained percentages, I shall hold, following the rule above stated, that to the extent that these moneys were paid out of retained percentages, which was security for the sureties, this surety was discharged. Giving to this defendant full credit for these $30,000 and its share of the full amount of weekly payments, even conceding they were all not properly made, the liability of this defendant to the extent of $50,000 would not be affected. With this result reached, it will not be necessary to consider the effect of certain clauses of the contract on the sureties' liabilities as contended for by plaintiff. Defendant New England Company also claims that no judgment can be entered in this court against it because it is in the hands of a receiver in Massachusetts. It does not appear that it has been dissolved. The action is rightly brought against it in the State of New York. *Kincaid* v. *Dwinelle,* 59 N. Y. 548; *Pringle* v. *Woolworth,* 90 id. 502.

Motion to set aside the directed verdict is denied.

Motion denied.

EDWARD LEWIS, Plaintiff, *v.* FRANCIS A. LUDLAM, Defendant.

(Supreme Court, Nassau County, April, 1921.)

Lease — option to purchase — when specific performance will not be decreed.

Where a lease provides that if at any time the lessor decides "to sell the premises" the lessees shall have the preference at such sale, specific performance of the option to purchase may not be decreed in the absence of proof that the lessor ever decided or had tried or offered to sell the premises.

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ACTION for specific performance of an option to purchase.

Henry Amerman, for plaintiff.

McCoun & McCoun, for defendant.

VAN SICLEN, J. The plaintiff sues for specific performance of an option to purchase as contained in a lease. In 1912, the plaintiff, together with Joseph B. Meade, as tenants, entered into a lease of certain premises with the defendant as lessee. The lease contained a privilege of renewal for five years more and an option to purchase the demised premises at the price of $20,000. At some time before 1916, one McNulty was given some portion of the two lessees' interest in the lease. Then in 1916, Meade and McNulty assigned all their interest to the plaintiff by and with the knowledge and consent of the defendant, and it must be held that the defendant fully accepted the plaintiff as the sole tenant under the lease.

In 1917, the plaintiff duly exercised his option to renew the lease and it might be held from the facts that the lease was duly renewed for another term of five years or to 1922 and that the defendant accepted the plaintiff as the sole lessee under and by virtue of such renewal. *Pflum* v. *Spencer*, 123 App. Div. 742, holds that such a renewal renews all the provisions of the lease, except the privilege to renew, and that an option to purchase is extended to cover the period of the renewal. Under this decision it can be spelled out that although the option ran originally to the two lessees only one of whom is now exercising the privilege, yet the subsequent acceptance of the plaintiff as the sole lessee both under the original lease and the renewal places him in the same position with reference to the option to purchase as the two original

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lessees would have been had both continued in occupation of the premises. So that even though there was any force as an abstract proposition, in the defendant's contention that the option was purely a personal agreement between the original parties because the lease does not purport to bind the assigns and legal representatives of the parties, yet it would have no weight in this case.

It is contended that the plaintiff must fail because he demanded more than he had the right to under the option. It may be conceded that the plaintiff demanded more property than he could get under the option but the refusal of the defendant was never placed on that ground. A demand previous to the action was unnecessary and would affect only the question of costs. The description in the demand was apparently the result of a mistaken notion that the lease covered more than that actually used by the plaintiff.

It is conceded that the defendant's wife is not a party to any of the agreements in suit and no judgment can be rendered binding her. Any conveyance found due the plaintiff must be that of the defendant alone and the plaintiff must take the same subject to the inchoate right of dower of the defendant's wife. It has been held in cases of specific performance of the ordinary contract of purchase that the husband may not successfully resist a specific performance of his contract to convey because his wife will not join in the deed and that an abatement in the purchase price would be allowed in case she refused to join in the deed. And there is no doubt that abatement is authorized in this case. *Rockland-Rockport Co.* v. *Leary*, 139 App. Div. 939; affd., 203 N. Y. 469.

The most serious question in this case, however, arises from the fact that the option or preference

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which the plaintiff had is qualified by and depends upon the following expression of the lease: "If at any time said lessor decides to sell said premises, the said lessees shall have the preference at such sale." There is no proof in the record that the lessor ever decided to sell the premises or that he had tried or offered to sell them. It is clear that he never gave any consideration to the plaintiff's attempts to exercise his preference or option. There is nothing from which an inference can be drawn that the lessor cared to sell the premises and it seems clear enough that the preference extended to the plaintiff was wholly dependent upon a desire or an intention on the part of the defendant to dispose of the property. No decision on the precise point has been cited by either party and the court has been unable to find any in this state. In the case of *Bullock* v. *Cutting*, 155 App. Div. 825, the parties assumed that the expression of such a desire or intention was a necessary prerequisite to the enforcement of the tenant's option. The following cases of other jurisdictions hold that such an option must necessarily be predicated on some expressed desire on the part of the landlord to sell. *McCormick* v. *Stephany*, 61 N. J. Eq. 208; *Devitt* v. *Kaufman County*, 27 Tex. Civ. App. 66; *Schroeder* v. *Gemeinder*, 10 Nev. 355.

So that even if the infirmities of the plaintiff's case by reason of the change in parties, the manner of renewal, the demand for more property than the option covered, the failure to have the defendant's wife bound and a somewhat incomplete tender, might be sufficiently resolved in his favor to warrant a judgment, yet the failure to show a desire to sell presents an insuperable obstacle to relief. The complaint must be dismissed.

Complaint dismissed.

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CITY OF NEW YORK, Plaintiff, v. WILLIAM R. WILLCOX et al., Defendants.

(Supreme Court, New York County, April, 1921.)

Constitutional law — equal protection of the laws not denied by Laws of 1921, chap. 154 — agreement between the states of New York and New Jersey pursuant to said statute is valid — injunction denied in action for abrogation of said agreement.

Subject to the approval of the Congress any two states may enter into a joint adventure to promote the common welfare of their citizens. (P. 354.)

The statute (Laws of 1921, chap. 154) designed to remove artificial barriers to delay in the shipment of goods existing at the port of New York and to confer special benefit upon the people of the states of New York and New Jersey, as well as the country in general, is not unconstitutional as a denial to the city of New York or its people of the equal protection of the laws, and the contention that said statute creates a new political subdivision is without merit. (Pp. 353–355.)

Where by an agreement entered into between the states of New York and New Jersey pursuant to said statute, they agreed to cooperate, each within its own sovereignty, and the agreement expressly limits the jurisdiction of the joint board of managers to such powers and authority as may be legally conferred upon them in conformity with the constitution of the state of New York and the constitution of the United States, it is obvious that the state of New York has parted with none of its sovereign rights nor relinquished the control over any property belonging to its people. (Pp. 354, 355.)

A motion to continue an injunction in an action brought by the city of New York seeking to have said agreement abrogated, denied upon the merits. (P. 357.)

APPLICATION for continuance of an injunction.

John P. O'Brien, for plaintiff.

Julius H. Cohen, Special Deputy Attorney-General, for defendants.

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DELEHANTY, J. This is an application for the continuance of an injunction pending the trial of an action instituted by the city of New York to prevent the consummation of an agreement between the states of New York and New Jersey for the development of the port of New York, pursuant to the provisions of chapter 154, Laws of 1921. The papers presented disclose that the facilities of the port are cumbersome and inadequate, and as a result thereof delays occur in the shipment of goods and unusual cost for terminal service is imposed. This is true to such an extent that traffic heretofore passing through the port is diverted on an extensive scale to other American harbors having modern and appropriate equipment. The principal difficulty at the port of New York, it appears, has been due to the fact that many of the continental trunk lines terminate in the state of New Jersey, while most of the oceangoing traffic is received and discharged upon the island of Manhattan and in the borough of Brooklyn in the state of New York, and that between the various shore lines of the port the state line of New York and New Jersey intervenes. It is with a view of co-ordinating the terminal facilities throughout the port district, and of administering them as a unit that the legislatures of the states of New York and New Jersey have drawn up and are about to execute the preliminary agreement which is sought to be abrogated in this action. The corporation counsel contends in the first place on behalf of the plaintiff that since the proposed compact provides for the joint management of piers located in the city of New York by representatives appointed by the states of New York and New Jersey, called the port authority, and for the transfer of freight and passengers in and about the city of New York under the joint control of such representatives, that the legislature of the state of New

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York has surrendered its sovereignty or some part of it to the state of New Jersey, and has delegated exclusive legislative functions of the state of New York to the state of New Jersey, or to the congress of the United States. It is further urged in support of this application that the proposed legislation is unconstitutional and void for the following reasons: That it would vest in the joint commission appointed by the respective states having charge of the administration of the port affairs, control over certain streets in the city of New York. That it authorizes the construction or operation of a street railroad, surface or subsurface, without containing the condition in regard to the consents of property owners and local authorities. That it violates the Fourteenth Amendment to the Federal Constitution in that it denies to the plaintiff and its people the equal protection of the laws. That it is an attempt to regulate the foreign and interstate commerce passing through the port of New York in violation of the Commerce Clause of the Federal Constitution. That it is an attempt to enter into a commercial treaty or alliance or confederation with the state of New Jersey, and that it seeks to create an unauthorized *quasi* political subdivision of the United States in violation of the Federal Constitution. It is also contended that the ferry franchises around Manhattan island are exclusive franchises in the city of New York, and may not be interfered with as provided in the proposed act in question. An examination of the authorities submitted on the hearing of this motion demonstrates that the claims of the city of New York are without legal justification, and that there is nothing in the proposed contract inimical to the rights of the people of the city or state of New York. On the contrary, the legislation in question is apparently designed to remove artificial barriers existing at the

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port, and to confer special benefit upon the people of the states of New York and New Jersey, as well as the country in general. It is well established that subject to the approval of congress any two states may enter into a joint adventure to promote the common welfare of their citizens. Such an agreement was entered into between New York and New Jersey in regard to Palisades Park, which lies upon the borders of the two states. The same states have another agreement as to the construction of a vehicular tunnel connecting the two states. In such cases it is not necessary or permissible to limit or surrender the sovereign rights of the people, but where such rights are properly preserved no question can be raised as to the validity of the compact. In the case at bar the act in question has been effectively drawn so as to preclude any point as to its unconstitutionality. It is expressly provided in article XVIII of the compact that the port authority or joint commission is authorized "to make suitable rules and regulations not inconsistent with the Constitution of the United States or of either state, and subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby." Since the legislature of each state now has the right to make rules and regulations for the improvement of the conduct of navigation and commerce not inconsistent with the Constitution of the United States or of either state, and subject to the exercise of the power of congress, this is but a direction to the port authority to prepare rules and regulations which the state may adopt. The two states under the proposed legislation agree to co-operate, each within its own sovereignty remaining supreme,

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It is obvious, therefore, that the state of New York has parted with none of its sovereign rights, nor relinquished the control over any property belonging to the people of New York. Moreover, the argument that the streets and ferries of the city are to be unlawfully appropriated or interfered with is conclusively answered in the proposed agreement itself. That agreement expressly states: "No property now or hereafter vested in or held by either state or by any county, city, borough, village, township or other municipality shall be taken by the port authority without the authority or consent of such state, county, city, borough, village, township or other municipality, nor shall anything herein impair or invalidate in any way any bonded indebtedness of such state, county, city, borough, village, township or other municipality, nor impair the provision of law regulating the payment into sinking funds of revenues derived from municipal property, or dedicating the revenues derived from any municipal property to a specified purpose." The contention that the legislative act herein creates a new political subdivision is also without merit. It is obvious that the outlining of a district for the purpose of applying therein certain rules and regulations under which the citizens of the whole state and of an adjoining state will reap an unqualified and direct benefit is not the creation of a political subdivision. No power to tax is granted, no governmental authority is bestowed, and, as pointed out above, the powers of existing municipalities over their properties and their sinking funds and their power to develop port and harbor facilities are expressly preserved. The sole power granted to the joint board of managers, which power is not to be exercised until the states have agreed upon a comprehensive plan, is to do only what any private corporation may do, namely, to own and

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operate terminal and transportation facilities, and to operate them not for private gain, but for the welfare and progress of the community. It is not necessary to point out in detail the respects in which the claims of the plaintiff fall short in regard to the remaining alleged grounds of unconstitutionality of the act herein. Suffice it to say that the compact expressly limits the jurisdiction of the joint board of managers to such powers and authority as may be legally conferred upon them in conformity with the Constitution of the state of New York and the Constitution of the United States. It is only within such limitations that the act in question at all presumes to be valid. The unwarranted position of the plaintiff herein is made more apparent by a review of the results that would obtain if the compact be treated as executed. In that event there would exist between the states of New York and New Jersey, *first,* a pledge on the part of each to co-operate in the development of the Port of New York; *secondly,* the boundary lines of the zone or district constituting the port will be fixed; *thirdly,* an agency or joint commission will be created, to which the legislature will delegate the execution of such plans as may be hereafter adopted by the two states, but which for some time can do nothing but study, hold public hearings and report; *fourthly,* an agreement will exist between the two states that they will endeavor to formulate physical plans, and that the commission may recommend rules and regulations for the better promotion of the commerce of the port "not inconsistent with the Constitution of the United States or of either state, and subject to the exercise of the power of congress; and, finally, that the commissioners who are to sign the compact on behalf of the two states are authorized to apply for the approval of the compact by congress. I am therefore con-

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strained to hold upon the merits of this litigation that the plaintiff has failed to establish a clear right to injunctive relief. Motion accordingly denied.

Motion denied.

Matter of the Estate of LOUIS D. KELLEY, Deceased.

(Surrogate's Court, New York County, April, 1921.)

Transfer tax — joint ownership of securities — whole value taxed — Tax Law, § 220.

Where prior to May 20, 1915, certain of the securities then owned jointly by decedent and his wife were sold and the proceeds invested in other stock and bonds which were at his death in a joint account opened by them with a brokerage firm in 1910, the transfer of securities by his death on July 20, 1919, was not of property owned prior to the amendment to section 220 of the Tax Law by chapter 664 of the Laws of 1915, and the transfer tax was correctly imposed upon the whole value of said securities.

APPEAL from order fixing transfer tax.

Simpson, Thacher & Bartlett (Hamilton C. Rickaby, of counsel), for executrix, Robertine Kelley.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for state comptroller.

COHALAN, S. This appeal is taken by the executrix of decedent's estate from the order fixing the transfer tax, on the ground that certain stocks and bonds held in the joint names of decedent and his wife have been taxed at their entire value.

The decedent died July 20, 1919. In February, 1910, he and his wife opened a joint account with a brokerage firm.

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By chapter 664 of the Laws of 1915, section 220 of the Tax Law was amended so as to provide that personal property held jointly should be taxed "as though the whole property to which such transfer relates belonged absolutely to the deceased * * * joint tenant or joint depositor." This act took effect May 20 of that year.

It was held in *Matter of McKelway,* 221 N. Y. 15, that as to property owned jointly before the passage of the act only half was taxable as a transfer at the death of one of the joint owners, who died subsequent to the amendment, notwithstanding the provision of law that the whole was subject to the tax.

This decision applies solely to property of which a decedent was a joint owner at the time of his death and which was acquired prior to the amendment. The transfer of all other joint property is taxable on the basis of the entire value. The record before the transfer tax appraiser shows that certain of the securities owned jointly prior to May 20, 1915, were sold and the proceeds invested in other stocks and bonds, which were in the joint account at the date of decedent's death. The transfer of these securities by the death of one of the joint tenants was not of property owned prior to the enactment of the amendment above referred to and the tax must, therefore, be imposed on the whole value thereof.

The report of the appraiser is correct and the order fixing tax affirmed.

Order affirmed.

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JOHN A. SUTTER, Plaintiff, *v.* AUGUST NENNINGER et al., Defendants.

(County Court, Kings County, April, 1921.)

Foreclosure — mortgage to secure lease — when extension of payment of installment of rent will not impair obligation of guarantor.

Where each installment of rent called for by a lease is a separate and independent demand an extension of the time of payment of one will not impair the obligation of a guarantor as to the others.

In an action to foreclose a mortgage given to secure performance of a lease for five years from January 1, 1916, the default alleged was non-payment of the rent for the period commencing October, 1918, and terminating with the month of April, 1919, the amount thereof being in excess of the principal of the mortgage. *Held,* that a letter from the lessor to the lessee granting a credit for a part of the rent from October 1, 1917, to September 30, 1918, and an extension of the time for the payment of the balance of rent accruing during that year, did not affect the rent accruing after the expiration of that period, even assuming that the letter, relied upon by defendant as a modification of the guaranty contained in the mortgage, was based upon absolute consideration.

There being no provision of the lease restricting the assignment thereof and the language of the guaranty for the payment of rent neither contemplating nor creating a trust personal to the promisee, the guaranty was not a special one.

ACTION to foreclose mortgage.

John R. McDonald (John B. White, of counsel), for plaintiff.

John Mcgregor (William W. Cantwell, of counsel), for defendant Nenninger.

BAYES, J. Foreclosure of mortgage given to secure performance of the terms, covenants and conditions of a lease. The lease is dated December 18, 1915,

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between the Sutter Company, a domestic corporation, lessor, and Richard Pastor, lessee, the premises leased being situate in Rockland county, N. Y. The term is for five years from January 1, 1916; rental for the first year, $696.65; for the second year, $1,200; and for each of the three remaining years, $1,500, the demised premises to be used for hotel purposes. The lease contains the following clause: "*And the party of the second part (lessee) further agrees to furnish a mortgage executed by one August Nenninger * * * on property owned by the said Nenninger at No. 77 Driggs avenue, * * * as security for the payments of rents to the extent of $500.00, which sum in the event of a breach of this lease is fixed as liquidated damages therefor.*" The mortgage required by the foregoing clause of the lease was likewise dated December 18, 1915, and executed by August Nenninger to said Sutter Company upon premises known as No. 77 Driggs avenue, Brooklyn. The mortgage recites the demise of the Rockland county premises (Vick's Hotel) and provides as follows: "*That the said Nenninger is justly indebted to the mortgagee (The Sutter Company) in the sum of Five hundred dollars ($500.00) lawful money of the United States of America, to be paid as provided for under the terms, covenants and conditions of the lease referred to, to the mortgagee, his legal heirs, representatives and assigns in the event that the said lessee, Richard Pastor, should become liable to the said Sutter Company, in the event of a breach of the terms, covenants and conditions of said lease and as therein provided for, not exceeding, however, the amount of the obligation herein mentioned, it being intended hereby to secure to the said Sutter Company the performance of said lease by the lessee and any damages which may result by reason of a breach thereof on the part of the lessee, not exceeding, however, the amount herein spcified.*" And, further,

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*"Provided always that if the said mortgagor, his legal representatives or assigns shall pay unto the said mortgagee, its legal representatives or assigns the said sum of money mentioned in the condition of the said obligation at the time and in the manner mentioned in the said condition, then these presents, &c., shall * * * be void."* Following the execution of the lease and mortgage, the said Pastor went into possession. The default alleged is non-payment of rent for the period commencing with the month of October, 1918, and terminating with the month of April, 1919, the amount thereof being in excess of the maximum of $500 specified in the mortgage. The mortgage and lease were assigned October 15, 1917, by the Sutter Company to John A. Sutter. The demised premises were conveyed October 25, 1917, by the Sutter Company to John A. Sutter and Benjamin F. Riley. Defendant Nenninger contends that his liability is discharged by reason of a modification of the terms of the contract of guaranty. This is predicated upon a letter written by the Sutter Company to Richard Pastor under date of October 11, 1917, and reading in part as follows: "In reference to our conversation of yesterday, beg to inform you that I have talked the matter over with Mr. Riley, and we are willing to make the following condition: After September rent, 1917, is paid, we will agree, for one year, from October 1, 1917, to September 30, 1918, to accept $700 in rent and give you a credit on our books for the difference, according to the terms of the lease, which would make a credit of $500. We do this in order that the conditions of the lease will not be broken in any particular. We, of course, could not ask for any stated monthly payment, as you inform me that you would be unable to pay rent during the winter. In order to evade waiting till the end of the year for the $700 we will make the condition that the rent be paid on demand at any time during

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the year. We, of course, will not press you and will not ask for any rent until such time as we think you could conveniently pay it, but before asking for any stated amount we will communicate with you to find out what amount it would be possible for you to pay." In my opinion, defendant's contention in this regard is untenable. The letter grants a credit for a part of the rental for the period from October 1, 1917, to September 30, 1918, and an extension of time for the payment of the balance accruing during that year. It does not, however, affect the rent accruing after the expiration of said period. It has been held that where each installment of rent is a separate and independent demand an extension of the time of payment of one will not impair the obligation of a guarantor as to the others. *Coe* v. *Cassidy,* 72 N. Y. 133; *Murphy* v. *Ottmann,* 127 App. Div. 567; *Ullman R. Co.* v. *Hollander,* 67 Misc. Rep. 287. The decision on this phase of the case assumes that the letter above referred to, which is relied upon by defendant as a modification of the guaranty, is based upon absolute consideration. It is proper to say, however, that I do not find from an examination of the letter, or by fair implication therefrom, that the alleged modification rests upon a valid consideration. *Brumm* v. *Gilbert,* 50 App. Div. 430. Defendant further contends the contract is a special guaranty made to the Sutter Company and hence not assignable until a cause of action thereon has arisen. There is not, however, any provision in the lease restricting the assignment thereof by the lessor, and the language of the guaranty contained in the mortgage does not contemplate or create a trust that is personal to the promisee. Hence the guaranty is not special and the cases cited by defendant do not apply. *Brumm* v. *Gilbert, supra.*

Judgment for plaintiff.

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PATRICK H. MURRAY, Claimant, v. STATE OF NEW YORK.

Claim No. 16130.

(State of New York, Court of Claims, April, 1921.)

Claims — when court without power to amend — notice of intention — contracts.

A claim may not be amended by setting up a cause of action of a nature different from that stated in the notice of intention and dependent upon essential facts not contained in such notice.

Where the notice of intention filed against the state for work done under a contract neither charges nor imputes to the state, its officers or agents, acts, faults or omissions other than those of negligence, mistake and error, the court is without power to amend the claim so as to set up fraud.

MOTION to amend claim.

H. G. Pierce (William Lynn, of counsel), for claimant.

Henry P. Nevins, deputy attorney-general, for State of New York.

CORWIN, J. The claimant herein duly filed a notice of his intention to file a claim against the state for work done by him under a certain contract with the state, stating that the claim arose out of "acts, faults and omissions of the State of New York, its officers, agents and servants." So far as is essential to the determination of this motion, the "acts, faults and omissions" specified in said notice of intention are as follows: (1) That the plans and drawings of the work to be done under said contract, which were provided by the state, its officers and agents, showed certain

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rock lines and rock excavation to be made by claimant; that the same had been "negligently prepared;" and that claimant was compelled to excavate in excess of the rock shown on the plans. (2) That the state, "by mistake and error of its officers and agents, preparing the plans and specifications of said contract omitted certain earth excavations * * * thereby requiring claimant to excavate 274 yards of earth and back filling." (3) That the state, "in preparing the plans and specifications, failed to show the existence of hardpan * * * and in place thereof showed silt sand and gravel."

The claim subsequently filed alleges, in substantially the same language, the same facts stated in the notice of intention.

The claimant now seeks to amend his claim so as to set up fraud.

In no place does the notice of intention filed herein charge or impute to the state or its officers or agents other "acts, faults or omissions" than those of negligence, mistake and error. That these are insufficient to support an action for fraud is clearly shown in *Kountze* v. *Kennedy*, 147 N. Y. 124, 129, where the court says: "Misjudgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit. The man who intentionally deceives another to his injury should be legally responsible for the consequences. But if through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the

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misrepresentation was honestly made, believing it to be true, whatever other liability he may incur he cannot be made liable in an action for deceit. The law affords remedies for the consequences of innocent misrepresentation." See, also, *Reno* v. *Bull,* 226 N. Y. 546.

It is, therefore, obvious that the notice of intention neither specifically states the nature of the claim to be that of fraud nor does it set up the essential facts from which such a claim can be imputed. And not only has the claimant filed no notice of intention to file a claim for damages arising out of fraud; but his notice of intention to file a claim for damages due to negligence, in effect, amounts to a disclaimer of intention to file a claim for the same damages growing out of fraud. *Konner* v. *State of New York,* 180 App. Div. 837, 842.

The due filing of a notice of intention is requisite to confer upon this court jurisdiction. *Buckles* v. *State of New York,* 221 N. Y. 418; *Butterfield* v. *State of New York,* Id. 701. Such notice of intention must state in detail the nature of the claim (Code Civ. Pro. § 264); and it cannot be amended. *Kleyle* v. *City of Oswego,* 109 App. Div. 330.

To permit the amendment asked for would deprive the state of the benefit of a notice of intention stating in detail the nature of the claim, would put the claimant in the position of urging a claim without having filed the requisite notice of intention, and would automatically oust the court of jurisdiction.

While we have no doubt of the power of this court to permit the amendment of a claim by the addition of an allegation material to the cause of action stated in the notice of intention and within the limits of the facts therein set forth, we believe that such power cannot be extended to permit an amendment setting

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up a cause of action of a different nature from that stated in the notice of intention and which cause of action is dependent upon essential facts not contained in such notice. The motion should, therefore, be denied.

ACKERSON, P. J., concurs.

Motion denied.

TILLIE TAUSZIG, Appellant, *v.* DAVID KANTOR, Respondent.

(Supreme Court, Appellate Term, First Department, December, 1920, Term — Filed May, 1921.)

Appeal — summary proceedings — order not appealable under Municipal Court Code, § 154.

Summary proceedings — when motion directing clerk of the court to deliver warrant denied — landlord and tenant — pending proceeding — statutes — Laws of 1920, chap. 942.

Under section 154 of the Municipal Court Code an order denying a landlord's motion for an order directing the clerk of the court to deliver the warrant in a summary proceeding, is not appealable.

Until the warrant in a summary proceeding is actually issued, the proceeding is pending within the meaning of chapter 942 of the Laws of 1920, even though a final order has been entered in the proceeding.

Where a tenant obtained the right to continue in possession of the premises after September 8, 1920, solely because of a stipulation made in a summary proceeding to leave the premises peaceably on September 30, 1920, the landlord consented to stay the execution of the final order and the court granted a stay until September 30, 1920, and the tenant, relying upon the provisions of chapter 942 of the Laws of 1920, in effect September 27, 1920, refuses to give up possession on the thirtieth, a motion for an order directing the clerk of the court to deliver to the landlord the warrant in the summary proceeding as of September 8, 1920, was properly denied, as until the warrant actually issued the summary proceedings are pending.

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APPEAL by the landlord from an order of the Municipal Court of the city of New York, borough of Manhattan, eighth district, denying landlord's motion for an order directing the clerk to deliver a warrant.

Oppenheim & Helfant (Benjamin Oppenheim, of counsel), for respondent.

Gustavus A. Rogers, for appellant.

LEHMAN, J. The landlord initiated summary proceedings against the tenant on the ground that he was holding over after the expiration of his term. Upon the return day, April, 1920, the tenant appeared in person and asked for a three months' stay which was granted. The exact nature of the proceedings at that time does not appear in the record but it is undisputed that no final order was entered at that time and the tenant did not deposit the rent in court or pay the same to the landlord. On August 21, 1920, a final order against the tenant was signed, directing among other things, in the usual form, that a warrant issue. Thereupon the tenant moved upon an order to show cause for a further stay and the motion was heard on September 8, 1920. Upon the hearing of that motion the trial justice informed the tenant that no further stay could be granted to him but upon the urgent request of the tenant the trial justice asked the landlord whether she would consent, if the warrant were issued, "to stay physically putting the tenant out of possession until after the Jewish holidays, if the tenant would agree to peaceably and quietly give up possession of the premises on September 30th, 1920, without application for further stay or doing anything to resist the landlord from executing the warrant on October 1st, if the tenant failed to comply with the stipulation." The landlord replied that he

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would agree that the warrant should issue, but that he should do nothing until September 30, 1920. The trial justice thereupon indorsed on the papers the words "Landlord consents to stay of warrant until September 30, 1920." It further appears that on the day prior to the hearing a warrant to dispossess the tenant was prepared upon the usual form but was not signed by the clerk of the court. On September 27, 1920, chapter 942 of the Laws of 1920 was enacted and became immediately effective and it was therein provided that in a pending proceeding for the recovery of real property in the city of New York, on the ground that the occupant holds over after the expiration of his term, a warrant shall not be issued unless the petitioner establishes to the satisfaction of the court that the proceeding is one mentioned in the exceptions enumerated in the statute. The tenant, relying upon the provisions of this statute, has refused to give up possession of the premises and the landlord thereupon obtained an order to show cause "why an order should not be made herein directing that the clerk of this court deliver to the landlord herein the warrant in these proceedings as and under the date of September 8th, 1920, and why the landlord should not have such other or further relief as to the court may seem proper." Upon the return date the tenant did not dispute any of the allegations of fact set forth in the moving papers and the court expressly found the facts to be as stated therein but denied the landlord's motion "because of the lack of power of the court to grant the order prayed for by reason of the enactment of chapters 942 to 953 of the Laws of 1920, passed September 27th, 1920." The landlord now appeals from the order denying her motion.

We are all agreed that the order is not an appealable order under section 154 of the Municipal Court Code

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but I cannot agree with the suggestion of Mr. Justice Guy that the summary proceedings are not pending within the meaning of chapter 942 of the Laws of 1920, or that the clerk should or could deliver a warrant to the landlord. There can be no doubt but that the tenant has obtained the right to continue in possession of the premises after September eighth solely because, upon his stipulation to leave the premises peaceably on September thirtieth, the landlord consented to staying the execution of the final order and the court granted a stay upon the landlord's consent. It may be that in some cases the wilful failure of a party to comply with a stipulation which he entered into for the express purpose of securing a mandate of the court in his favor can be punished as a contempt of court and at the present time we need not express any opinion as to whether, in view of the enactment of the rent laws, the landlord in the present case would be entitled to such relief if he asked for it. The stipulation of the parties cannot, however, confer upon the court a jurisdiction which the legislature has taken away from the court and consequently in spite of this stipulation, the court cannot direct that a warrant shall be *issued* in any pending proceedings brought upon the ground that the tenant is holding over, unless the landlord establishes to the satisfaction of the court that the proceeding is one mentioned in the exceptions enumerated in chapter 942 of the Laws of 1920 and concededly she has not even sought to establish such facts.

It is urged, however, that under the stipulation it was intended that the warrant should issue on September 8th and that only its execution should be stayed and that the trial justice should now order the clerk to *deliver* the warrant as if issued on the date of the stipulation and if necessary, to amend the record

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of the proceedings held on September eighth to effectuate the intent of the parties. It seems to me that that contention is without merit. A proceeding is pending within the meaning of the statute even though a final order has been entered, until the warrant is actually issued. If the trial justice did not stay the issuance of the warrant on September eighth, then the signing of the warrant was only a ministerial act on the part of the clerk which the trial justice has no authority to direct the clerk to perform. In the case of *People ex rel. Kilgallon* v. *Nuhn*, 92 Misc. Rep. 311; affd., without opinion, 173 App. Div. 895, the court said: "When the final order was made and delivered to the respondent (the clerk of the court), it was his duty thereupon to sign and issue the warrant unless he was stayed from so doing by some statutory provision or by an order of a court of competent jurisdiction. The warrant is issued when signed by the clerk of the Municipal Court and delivered for execution. *Ash* v. *Purnell*, 32 N. Y. St. Repr. 306. The warrant was not signed by the clerk until about October 29, 1915, on which day an order was made by the justice making the final order directing respondent to sign the warrant 'as filed and now in his office' as of the date of said final order. The justice had no authority to make such an order; the performance by the clerk of his duty in that regard could be compelled by a writ of mandamus." Under the authority of that case it would appear that the landlord's remedy, if any, was by mandamus and not by motion made in the Municipal Court.

In the present case, however, the clerk properly refused to sign or deliver any warrant. The trial justice has the right to amend the record of the proceeding only in so far as that record is incorrect. If he intended to grant only a stay of the execution of

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the warrant but to direct the clerk to *issue* the warrant immediately, it is quite probable that he would have power to amend the record in that respect but until such direction was complied with the warrant would still not have been issued and the proceeding would still be pending within the meaning of chapter 942 of the Laws of 1920. The issuance of the warrant is a distinct step in the proceedings. It is not the final order but only the issuing of the warrant which annuls the relation of landlord and tenant. Code Civ. Pro. § 2253; *Cornwell* v. *Sanford,* 222 N. Y. 248. The amendment of the record would at most have the effect of a direction to the clerk as of September eighth for the immediate issuance of the warrant but it would still be the fact that no warrant was signed by the clerk or delivered. A warrant is not issued until it is not only signed but actually delivered for execution. "The clerk cannot execute it, and while in his hands it is subject to the control of the landlord, who may not want it executed. The words in section 2251, that 'the justice must thereupon issue his warrant,' etc. evidently mean that he must, if requested, issue the same." See 3 McAdam Landl. & Ten. (4th ed.) 140. It is true that in *Ash* v. *Purnell,* 11 N. Y. Supp. 54, it was held that the warrant was issued when the magistrate signs the warrant and delivers it to *the clerk* of his court and that case has been cited in *People ex rel. Kilgallon* v. *Nuhn, supra,* with approval but as shown above it is cited as authority for the rule that "the warrant is issued when *signed by the clerk* of the Municipal Court and *delivered for execution.*" Italics are mine. Even if the case of *Ash* v. *Purnell, supra,* established the rule that a warrant was issued when signed by the judge and delivered to the clerk though it remained in the possession of the clerk and was never delivered by him for execution, that

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rule would still not apply to this case for it rests upon the proposition that the statute as it existed at that time placed the duty of signing and issuing the warrant on the judge and not the clerk and when the trial judge had *delivered* the warrant to the clerk for the purpose of having it executed, he had performed his full duty under the statute but under the Municipal Court Code, section 6, the clerk has the right to sign the warrant and the warrant cannot be said to be issued until the person signing it has *delivered* it over to some person authorized to receive it. In its final analysis, therefore, the landlord had the right on September eighth to the issuance of a warrant but because of the promise of the tenant to vacate quietly on September thirtieth, he did not demand that the warrant be issued until after that date. Until the warrant was issued the proceedings are pending and in a pending proceeding no final warrant can now issue.

Appeal should, therefore, be dismissed, without costs.

GUY, J. (concurring). On the hearing of September 8, 1920, the court refused the tenant's application for a further stay and directed the issuance of a warrant, and the clerk actually made out a warrant as of that date. After such direction, on the tenant's stipulation that the warrant should issue as of that date and that he would vacate the premises on September 30, 1920, the court indorsed on the papers: "Landlord consents to stay of warrant until September 30, 1920." Had there been no previous determination by the court refusing a stay and directing the issuance of a warrant, such indorsement would be construed to mean that the issuance of a warrant was stayed; but in the light of the actual decision and the direction that a warrant issue as of that date and the subse-

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quent stipulation to the same effect, it must be construed as meaning that merely the execution of the warrant already directed to be issued was stayed. The appending of the signature to the warrant was a mere clerical omission, which under section 6, subdivision 7, of the Municipal Court Code, the court had power to correct at any time. For the purposes of this proceeding, therefore, the warrant must be deemed to have issued as of September 8, 1920, and the proceeding was no longer a pending proceeding. The statutory provision subsequently enacted against the issuance of a warrant in pending proceedings is not applicable. I am of the opinion, however, that the order from which the appeal is taken is not an appealable order, and that the landlord's remedy is by mandamus. As a fraud has been practiced upon the court and upon plaintiff by the tenant's refusal to carry out the terms of his stipulation, the dismissal should be without costs of appeal.

Appeal dismissed, without costs.

PEOPLE ex rel. HENRY BENNETT MACHEN, Relator, *v.* NICHOLAS J. HAYES, as Commissioner of Water Supply, Gas and Electricity of the City of New York, Respondent.

(Supreme Court, New York Special Term, May, 1921.)

Civil Service Law (Laws of 1919, chap. 225), § 22-b — World war veterans — when position not abolished — mandamus — statutes.

In the absence of direct statutory provision to the contrary, a position in the civil service may be abolished only by the same agencies that created it. (P. 377.)

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Technically such a position in the water supply, etc., department of the city of New York, as distinguished from the incument or the salary, is not abolished until appropriate action to that effect is taken by the commissioner of water supply, etc., and the board of aldermen. (P. 377.)

The sole test prescribed by section 22-b of the Civil Service Law (Laws of 1919, chap. 225) for the right of a World war veteran who left his position in the civil service to enter the federal military service, to restoration, is that his former position must exist at the time of his discharge from the army. (P. 379.)

On August 31, 1918, relator, who since 1911 had been assistant engineer in the department of water supply, etc., of the city of New York, left his position to enter the federal military service from which he was honorably discharged September 30, 1920. Upon the hearing of an application pursuant to section 22-b of the Civil Service Law (Laws of 1919, chap. 225) for a peremptory writ of mandamus to compel the commissioner of water supply, etc., to reinstate him as an assistant engineer, *held,* that where notwithstanding the respondent's contention that the position formerly held by relator had been abolished, it clearly appeared that after the shifting of various engineers of the same general character as relator and after the intradepartmental transfer of "office designations" and "titles," the position of relator as he left it to enter the federal military service was intact upon his return, he came within both the letter and spirit of the statute and was entitled to the writ directing his restoration to his former position. (Pp. 375, 380, 382.)

APPLICATION for peremptory writ of mandamus.

Cadwalader, Wickersham & Taft (Cornelius W. Wickersham, of counsel), for relator.

John P. O'Brien, corporation counsel (Arthur Sweeny, of counsel), for respondent.

BIJUR, J. This is an application for a writ of mandamus directed to the respondent as commissioner of water supply of the city of New York requiring him to reinstate the relator as an assistant engineer in the department at a salary of $5,000 a year.

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It appears from the petition that the relator had been an assistant engineer in the department since July 1, 1911, at an annual salary of $5,000; that on August 31, 1918, he left his position to enter the federal military service (in which he had been commissioned a major in the ordnance reserve corps about July 1, 1918), and that he was honorably discharged September 30, 1920. The application is made pursuant to section 22-b of the Civil Service Law (Laws of 1919, chap. 225), which, so far as material, reads: "Any person heretofore employed in the classified civil service of the state of New York or of a civil division or city thereof who has left his or her position or employment for the purpose of entering and has entered the federal military, naval or marine service * * * shall be entitled to be restored and shall be restored to such civil service position or employment * * *."

Respondent's return is in substance that since February 5, 1918, he had been considering a reduction of the force in his department and that some time in 1918 he "prepared the departmental estimate of expenses for the year 1919." "In this estimate the position of petitioner herein, Mr. Machen, as assistant engineer, with compensation at the rate of $5,000 a year, was abolished;" in the same estimate a Mr. McKay, as assistant engineer in the borough of Richmond, then receiving $4,000 a year, was included with an increase of $1,000 for 1919; relator had been engineer for the boroughs of Manhattan and The Bronx. After his entry into the federal military service McKay was transferred from Richmond to Manhattan, his duties to include the latter borough as well as The Bronx and Richmond. Coincidently with the elimination of relator Machen, the services of three other engineers were dispensed with, and these four vacated positions

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were not filled. "In 1921 certain transit men who were in the department were made assistant engineers by change of title, with very slight increases in pay." About a year ago "one of the subordinate engineers in the borough of Richmond * * * received the office designation of borough engineer of Richmond, and the assignment of the former borough engineer of Richmond (evidently meaning Mr. McKay) was thereafter limited to the boroughs of Manhattan and The Bronx. No additional appointment as assistant engineer has been made by me to perform any of the duties previously performed by Mr. Machen."

It is quite clear from this recital that at the conclusion of the temporary administrative changes made by the commissioner, Mr. McKay is now occupying relator's former position, with the same duties, the same salary and the same title, and that conformably to the statute relator should be restored thereto.

The contention of respondent, however, is that relator's position was "abolished" and that "the engineering force consisting of assistant engineers was reduced from forty-one in 1918 to thirty-seven in 1919, and again reduced to thirty-two in 1920."

While I do not base my opinion upon the technical point that the position was not "abolished" in the strict sense of that term, it may not be amiss to note that the term "abolished" of a position has been infrequently used without regard to its precise significance. Section 1543 of the Greater New York charter provides: "* * * The number of all officers, clerks, employees, laborers and subordinates in every department shall be such as the head of the respective departments and Borough Presidents shall designate and approve, not exceeding the number limited by any ordinance of the board of aldermen." I think it is a

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fair inference in the absence of any direct statutory provision to the contrary that a position can be abolished only by the same agencies that created it, and that, therefore, from a technical point of view, a position as distinguished from the incumbent or the salary attached thereto is not abolished until appropriate action *to that effect* is taken by the commissioner *and* the board of aldermen. See *Colihan* v. *Miller,* 72 Misc. Rep. 140.

It is true that a number of cases speak of positions as having been abolished without reference to the question whether formal action has been taken by the board of aldermen or not. It will be found, however, that these cases are concerned largely with the application of what is now section 22 of the Civil Service Law, relating chiefly to Civil War veterans. So far as material it reads: "If the position so held by any such" veteran "shall become unnecessary or be abolished for reasons of economy or otherwise, the said" veteran "holding the same shall not be discharged from the public service, but shall be transferred to another branch of the said service for duty in such position as he may be fitted to fill, receiving the same compensation therefor," etc.

The contingency expressed in section 22 is that the position *become unnecessary* or be abolished for reasons of economy or otherwise. It was therefore quite immaterial in those cases to determine whether there had been a permanent abolition of the position in its strict sense or whether it had merely become unnecessary either permanently or temporarily. Consequently the opinions speak indifferently of the position as having been abolished or having become unnecessary, since in either event the relator there would be regarded as having been properly dropped from office. It is important to observe, however, that

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section 22 provides specifically what disposition is to be made of the incumbent in case his services are dispensed with because the position is abolished or becomes unnecessary. There are no analogous express provisions in the act which I am considering. One of the determinative considerations in the decisions dealing with section 22 has been that expressed in the leading case of *Matter of Breckenridge,* 160 N. Y. 103, 108, as follows: "I do not think we should impute to the legislature the absurdity of intending to saddle an unnecessary officeholder upon the city, or the injustice of intending that some faithful and possibly more efficient officer, who happens not to be a veteran, must be discharged to make room for the incumbent of the abolished office. The legislative intent was to secure the retention in the public service of the veteran who is thrown out of office by its abolition 'in such position as he may be fitted to fill, receiving the same compensation therefor;' which seems, necessarily, to imply that a vacancy in such a position must exist."

These views are peculiarly pertinent to cases arising under section 22 which provides for the future of the displaced veteran by requiring his preferential transfer to some other office. He enjoys a specified advantage whenever he loses his office by reason either of its having been abolished or having become unnecessary. I take it, therefore, that it would not be unfair under those circumstances to hold that his services may be dispensed with under the provisions of section 22, even though the position has become only temporarily unnecessary. Thus, for example, if the head of a department should find the position of a veteran superfluous because of an attempted reorganization of the department which eliminated that position for the time being, but should ultimately discover that it could not be permanently omitted, it

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would be quite consonant with the spirit of section 22 that the previous incumbent should not be restored to his original position, but should continue to enjoy only the preference awarded to him by the statute, which frequently indeed would already have become effective by having placed him in another position.

On the other hand, to come to the statute of 1919, which we are considering, the only provision for continuance in the civil service of the World War veteran is that he shall be "restored to his position." Manifestly, the legislature must have had in mind that the positions of the many employees who went to the World War were not superfluous, and that during their absence such positions would have to be filled either by temporary incumbents or by such temporary reorganization and consolidation as would enable their duties to be performed by other employees. The sole test prescribed for the right of the World War veteran to restoration is that his former position must exist at the time of his discharge from the army. This we find to be the case in the present proceeding. It represents, I think, the precise contingency contemplated by the statute. Otherwise I am afraid that we should be confronted with the paradox that the statute would require the restoration of the former incumbent to his position only if it had not been abolished or had not been temporarily filled during his absence; that is to say, only in case it was in fact unnecessary in every event.

Although respondent suggests in his return that the change in the organization of the department during the absence of relator was not due to that absence, but was carried out for purposes of economy, the result was manifestly the same. It is not—indeed, cannot—be claimed that the position was abolished *before* relator left for the war, namely, August, 1918,

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since, according to the return, the change was recommended to become effective only in 1919.

The learned corporation counsel says in his brief: "It surely cannot be contemplated that a person who has served for years in the department of water supply, gas and electricity shall be removed in order to make room for Mr. Machen's reinstatement." Without adverting to the fact that relator is disclosed by the petition to have been in the employ of the same department since 1905, and that, therefore, the *argumentum ad hominem* loses force when directed at him, I see no moral reason for discriminating against an employee who placed his life and limb at his country's service in favor of one who — although with perfect propriety and perhaps of necessity — remained at home. The fact stands out clearly that, after the shifting of various engineers of the same general standing as relator and after the intradepartmental transfer of "office designations" and "titles," the position of relator as he left it to enter the war was intact upon his return and he should, conformably to the statute, be restored thereto.

From another point of view also I reach the same conclusion. While it is claimed that relator's position has been abolished, whether formally or informally, and that during at least a year it did not exist as relator had occupied it, but was to a certain extent consolidated with another similar position in the department, and respondent further claims in his affidavit that "the number of positions of the same designation as relator's was reduced from 41 in 1918 to 37 in 1919, and again reduced to 32 in 1920," he concedes that "in 1921 certain transit men who were in the department were made assistant engineers by change of title, with very slight increases in pay." It is difficult to understand how, if the positions had

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been abolished, transit or any other men could be made assistant engineers. Indeed, the analogy is almost perfect to *People ex rel. Davison* v. *Williams,* 213 N. Y. 130, in which it is said at page 134: "The fact is that simultaneously with the relator's removal two men were demoted from other positions and reclassified as laborers in order to keep them in the department. At the same time that the commissioner reduced the positions, he increased them. He had the right to reduce the number of laborers, and in so doing suspend the relator from duty; but if he increased the number at the same moment that he reduced it, his duty was to transfer the relator to the position thereby created."

I think that in this aspect we may regard section 22-b as that "plain, imperious legislative mandate" referred to in *Matter of Breckenridge, supra,* at page 109, as one "of which the court must compel the execution."

I am referred by respondent to the case of *People ex rel. Steers* v. *Delaney,* N. Y. L. J., March 9, 1920, as authority for the refusal of the writ now prayed for. Without adverting to other considerations covered by the opinion of the learned judge in that case, it suffices to quote from his recital of the facts "that no one has been employed to do the work which the relator formerly performed," to distinguish it in this vital point from the case at bar.

Respondent urges, also, that relator "resigned" his position on August second and that his resignation was regularly reported to the municipal civil service commission and by the commission duly entered upon its records. Apart from some unimportant details which are recited in the return, this claim is based upon relator's letter of August 2, 1918, reading: "I beg to advise you that on account of having received

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notice of my appointment as a major in the ordnance reserve corps it will be necessary for me to sever my connection with the water department. I therefore request that you accept my resignation."

Although no formal reply to this letter is set out, it appears to be conceded that relator was in some informal manner advised that his resignation had been accepted as of August thirty-first as was customary. I am not concerned with whether this be called a resignation or a withdrawal or defined by any other form of words. It surely would have been surprising if relator had on the date of the acceptance of his enlistment in the military forces of the United States dropped his work and walked out of his office without notifying his superiors. It was a corollary of his voluntary enlistment in the military service of his country that he should apprise the head of his department of his withdrawal in some appropriate manner, and this he did. Any other course would have been inexcusable. But the statute under which he seeks reinstatement, and which was not passed until nearly a year after his "resignation," is not limited in its application to persons who severed their relations with the local civil service in any particular manner. Relator's course, as described by respondent, identifies him as one who in the very words of the statute "has left his position for the purpose of entering the federal military service, and by reason thereof has been unable to perform the duties of his position in said civil service."

In my opinion, the case of relator falls within both the letter and spirit of section 22-b, and he is therefore entitled to the peremptory writ prayed for.

Application granted.

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GASTON JAILLET, Plaintiff, *v.* JOSEPH CASHMAN, as Treasurer of Dow, JONES & COMPANY, Defendant.

(Supreme Court, New York Special Term, May, 1921.)

Associations — unincorporated— ticker service — when no action lies against an association for damages occasioned by its incorrect report of decision of United States Supreme Court on taxable status of stock dividends — libel.

While everyone is under moral obligation to say nothing that is not true, the law does not attempt to impose liability for a violation of that duty, unless it constitutes a breach of contract or trust or amounts to a deceit, libel or slander.

The relation of an unincorporated association engaged in the business of supplying its subscribers with current news by a ticker service to the public, is the same as that of a publisher of a newspaper, and its duties and obligations are to be measured by the same standard.

No action lies against such an association for damages occasioned by its incorrect report of the decision of the United States Supreme Court on the taxable status of stock dividends, by one who seeing such report in his broker's office, sold stocks at a loss, and his complaint must be dismissed.

MOTION on demurrer.

Podell, Ansorge & Podell (David L. Podell, of counsel), for plaintiff.

Emmett, Marvin & Roosevelt (Langdon P. Marvin, of counsel), for defendant.

TIERNEY, J. The defendant is the treasurer of Dow, Jones & Company, an unincorporated association engaged in the business of supplying its subscribers with items of current news by what is known as a ticker service. On March 8, 1920, it incorrectly

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reported the effect of a decision of the United States Supreme Court on the taxable status of stock dividends as income. Plaintiff saw the report on a ticker in his broker's office, and believing that prices were going down he sold stocks instead of holding or buying. That was unprofitable because the market rose on receipt of a correct report of the decision, and the plaintiff figures out a loss that he claims is attributable to the incorrect report that he read, and which he claims should be made good to him by the defendant because the mistake was made through negligence. I think that the relation of the defendant association to the public is the same as that of a publisher of a newspaper, and that its duties and obligations are to be measured by the same standard. A mistake in the report of a fact by one or the other is different in its effect only as to the number of people who may be misled and the extent to which individuals may be misled a matter of degree only. There is moral obligation upon everyone to say nothing that is not true, but the law does not attempt to impose liability for a violation of that duty unless it constitutes a breach of contract obligation or trust, or amounts to a deceit, libel or slander. Theoretically, a different rule might be logically adopted, but as a matter of practical expediency such a doctrine seems absolutely necessary. There is no privity between this plaintiff and the defendant. He is but one of a public to whom all news is liable to be disseminated. His action can be sustained only in case there was a liability by the defendant to every member of the community who was misled by the incorrect report. There was no contract or fiduciary relationship between the parties, and it is not claimed that the mistake in the report was intentional. The demurrer to the complaint is sustained and judgment awarded dismissing the complaint, with

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ten dollars costs and the costs of the action. As the defect in the complaint is one of substance, and not of form which could be cured by an amendment, no provision for amending the complaint is proper or necessary.

Demurrer sustained and complaint dismissed.

Matter of the Estate of HERMANN SIELCKEN, Deceased.

(Surrogate's Court, New York County, May, 1921.)

Discovery — when motion to vacate order for, granted — wills — evidence — Code Civ. Pro. § 2607.

The proceeding under section 2607 of the Code of Civil Procedure was not intended and should not be used merely as a sort of discovery proceeding to ascertain evidence to be used in an action in another court.

Decedent died in 1917 and his last will dated March 23, 1914, by which all prior wills by him made were revoked, was duly admitted to probate. *Held*, that a motion to vacate an order made in a proceeding under section 2607 of the Code of Civil Procedure directing an attorney to attend for examination concerning a will of decedent made in 1907 and to produce the document which was alleged to have been made in accordance with a contract which was alleged to have been violated in the execution of the will admitted to probate, will be granted.

APPLICATION to vacate order to attend and be examined.

Niles & Johnson, for petitioner, Marguerite A. Blackwell.

Davis, Auerbach & Cornell, for Clara Sielcken.

Smith & Agate (Leonard B. Smith, of counsel), for Eugene Smith.

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COHALAN, S. This is an application to vacate an order directing an attorney to attend and be examined "concerning the paper writing made and executed by Hermann Sielcken in the year 1907 as his last will and testament," and ordering the attorney to produce the alleged document.

The deceased above named died October 8, 1917, leaving a will dated March 23, 1914, which has been duly probated. This will contains a clause revoking all prior wills.

The petitioner claims that the last will is in violation of a contract made by the decedent. The will of 1907 is alleged to have been executed in accordance with such a contract. It appears, therefore, that if said alleged will were produced, it could not be used in any proceeding in this court. It might be used in an action brought on the alleged contract to make a will.

The question is whether the proceeding under section 2607 can be used solely in aid of a possible action in another court. I do not think it can. In *Matter of Hardy*, 216 N. Y. 132, Judge Chase said: "Section 2621a of the Code of Civil Procedure was new in 1910. It was re-written in 1914 and continued as section 2607. This section of the Code contemplates a proceeding in advance of the proceeding to probate the will to carry out and make practical the procedure in Surrogate's Court, as it had long existed and as it is now regulated by express rule adopted in several of the counties of the state, requiring the production of the will sought to be probated." The will sought to be produced is revoked by the express provision in the last will, which has been duly probated. No attack upon that decree is made or suggested. The paper in question will never be probated as a will. If it is given effect it will be through an action in some other forum. The

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proceeding under section 2607 was not intended and should not be used merely as a sort of discovery proceeding to ascertain evidence to be used in an action in another court. In *Matter of Denham,* N. Y. L. J., June 23, 1917; affd., 180 App. Div. 935, it was held that a proceeding in this court could not be used merely as a sort of examination before trial for the real litigation in another court.

The motion to vacate the order of May 2, 1921, is granted.

Motion granted.

SAM SAFIAN, Plaintiff, *v.* IRVING NATIONAL BANK, Defendant.

(Municipal Court of the City of New York, Borough of Manhattan, Second District, May, 1921.)

Banks and banking — "cable transfer" — contracts — plaintiff entitled to judgment for amount paid for cable transfer.

The term "cable transfer" precludes the idea that an actual transfer of money is contemplated or intended by the parties thereto. (P. 388.)

The seller of a "cable transfer" is in the position of having sold at an agreed price a credit for a sum of money payable at the place indicated in the written memorandum and the buyer has purchased a credit for such sum available at the place and for the payee named. (Id.)

While money paid for a "cable transfer" becomes the money of the seller, it is still under obligation to the buyer to pay to the payee named in the "cable transfer," the agreed equivalent in foreign exchange of the amount received for such transfer. (Pp. 388, 389.)

Where in an action to recover the amount paid to defendant for a "cable transfer" of 7,000 marks to a relative of plaintiff, in Poland, who at all times since the transaction has continued to reside at the address originally furnished to defendant, it appeared that the marks were never delivered although nearly a year and a half had elapsed from the time of the pur-

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chase of the "cable transfer" and saving clauses in the agreement on which defendant seeks to escape or limit its liabilities have not the effect claimed for them, plaintiff is entitled to judgment for the full amount demanded. (Pp. 389–392.)

ACTION to recover for amount paid for cable transfer to Poland.

Krakower & Peters (Charles C. Peters, of counsel), for plaintiff.

Hanlon & DeLacy (Daniel E. Hanlon, of counsel), for defendant.

BLAU, J. Plaintiff seeks the recovery of $305 paid to the defendant in September, 1919, for a cable transfer of 7,000 marks to a relative in Poland.

The printed form used by defendant in the instant transaction, gives the name and address of the person in whose favor the transfer was to be effected and the name of the purchaser.

Whatever difference of opinion or rulings may formerly have existed with reference to cable transfers it now seems definitely settled that the term "cable transfer" precludes the idea that an actual transfer of money is contemplated or intended by the parties thereto. The seller of the cable transfer — in this case, the defendant — is in the position of having sold at an agreed price a credit for a sum of money payable at the place indicated in the written memorandum or contract; and the buyer — the plaintiff here — has purchased a credit for such sum available at the place and for the payee named.

Upon making payment for the cable transfer the plaintiff completed the transfer so far as he was concerned; and the money paid became at once the property of the defendant as the seller of the transfer. But the defendant was left under obligation to the

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plaintiff to pay the agreed equivalent in foreign exchange of the amount received by it to the payee named in the cable transfer. *Oshinsky* v. *Taylor*, 172 N. Y. Supp. 231; *Strohmeyer* v. *Guaranty Trust Co.*, 172 App. Div. 16.

Despite a letter from defendant to plaintiff, dated January 19, 1920, four months after the transaction in question, which reported the "execution" of the cable transfer on the authority of defendant's Polish correspondent, it appears clearly from the testimony that the payee never received the 7,000 marks, although nearly a year and a half have elapsed from the time plaintiff purchased his cable transfer. On this point there is no dispute. It is, however, claimed on behalf of the defendant that while some form of liability is assertable against it, the measure of that liability must be limited to a return to plaintiff of 7,000 Polish marks, being the credit purchased, or the equivalent thereof in our currency at the time of demand made by him for a refund of his money.

Two reasons are assigned for this contention: *First.* That the defendant was without fault since it cabled the agreed transfer abroad promptly and correctly to its correspondent in Warsaw for transmission to the designated payee; and the non-payment thereof was due to no act of omission or commission of its own but to a subsequent mutilation of or error in the cabled message with which defendant cannot be charged. *Second.* That by the written terms of the transaction the defendant's liability in case of non-payment of the credit purchased, was limited to the current market value of the exchange in this city at the time of the claimed refund.

Both of these grounds are urged by defendant because of the conditions stamped or printed on the cable transfer here under consideration. Those provisions declare:

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"In making cable transfers it is fully understood and agreed that no liability shall attach to us nor our correspondents for any loss or damage in consequence of any delay or mistake in transmitting the message or for any cause beyond our control.

"Exchange will be purchased promptly to cover this remittance and payment therefor is only accepted upon the following conditions: *If payment for any reason cannot be effected,* the Irving National Bank will not be liable for any sum in excess of the current market value in New York at the time the refund is made."

These saving clauses in the agreement, obviously inserted for the defendant's benefit and protection, cannot cover or protect the defendant in the instant transaction. The marks were *never* delivered; and a fair interpretation of the former of the two provisions just quoted must limit its operation to those cases in which through delay, error or any other cause beyond defendant's immediate control, payment has either been delayed or made in an erroneous amount, and loss has thereby been sustained. To give any other effect to the quoted language would mean that the defendant, regardless of the non-payment of the money or of the failure of the payee to receive any part of the remittance intended for him, could claim complete freedom from liability on the ground that it had in the first instance sent a cable in correct form to its foreign correspondent, and thereby absolved itself from all further responsibility. Merely to state this conclusion is to show the untenable character of the claim.

Nor does the second of the quoted provisions help the defendant. The language provides for a limitation of liability "if payment for any reason *cannot* be effected." Here, however, payment *could* have

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been effected at all times subsequent to plaintiff's purchase of the cable transfer. The payee then resided and at all times since the transaction has continued to reside at the address originally furnished to defendant. It is true that internal conditions in Poland, as testified to at length on the trial, go to prove that a longer time than the usual or normal period is required to effect cable transfers or credit transmissions; but this has relevancy only as to what constitutes a reasonable time for the execution of the transaction here sued upon. While this testimony may justify a delay, it cannot justify or excuse nonpayment of the money and thereby sanction its retention without accountability to plaintiff. The only purpose which this evidence serves, is to justify a finding that a delay of between thirty or forty days in completing or executing the cable order would have been excusable; but there is nothing to sanction a delay of between fifteen and eighteen months.

Furthermore, this case does not present the question of liability for a loss arising out of a *belated* or *delayed* transmission or payment as in *Strohmeyer* v. *Guaranty Trust Company, supra.* Here the record shows the *failure* to pay or effect payment at any time although more than fifteen months have elapsed since the transaction. Neither do the facts in the case at bar disclose an affirmative assumption of and for all errors, delays and losses arising out of acts or omissions of telegraph and cable companies, correspondents, and agencies of the defendant as in the unreported case of *Sommer* v. *Taylor* cited in defendant's brief. The form of the agreement in this last mentioned case was such that the trial court felt constrained to rule the plaintiff *precluded* from holding defendant responsible for the loss arising from the failure to make payment of the purchased credit.

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The facts in the case at bar are quite different. Defendant not having paid the money to the payee nor having returned it to the plaintiff after demand — and for the purposes of determining the rights of the parties, the institution of this action must be held equivalent to a demand — is *prima facie* in default. The saving clauses in the agreement on which it seeks to escape or to limit its liability have not the effect claimed for them; and judgment must accordingly go for the full amount demanded in favor of plaintiff.

Judgment for plaintiff.

Gaitano La Rosa, Plaintiff, *v.* Carter & Weekes Stevedoring Company, Defendant.

(Municipal Court of the City of New York, Borough of Manhattan, Second District, May, 1921.)

Municipal Court of city of New York — jurisdiction — negligence — ships and shipping — Municipal Court Code, § 6.

Under section 6 of the Municipal Court Code, the Municipal Court has jurisdiction of an action to recover for personal injuries where the injury complained of occurred upon a vessel in the navigable waters of the city of New York.

Action for personal injuries.

Albert & Albert, for plaintiff.

Clarence B. Tippett, for defendant.

Lauer, J. The nature and substance of the action is stated upon the summons: "For personal injuries sustained by plaintiff on November 29, 1920, at pier No. 21, Clifton, Staten Island." The defendant filed a special notice of appearance raising the objection that "this court has no jurisdiction over actions of this nature." On the argument and in the briefs sub-

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mitted thereafter both parties concede that the plaintiff was an employee of the defendant and sustained injuries in the course of his employment as a stevedore on board the steamship *Amagarso* which was moored to pier 21 at Clifton, S. I. It seems to be conceded that the plaintiff's work was maritime in its nature and that the defendant was engaged in a maritime pursuit.

There is no doubt that work performed by a stevedore on board a ship in unloading her at a wharf in navigable waters is maritime in its nature. Rights and liabilities arising from such work, employment and injuries are within the admiralty jurisdiction. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 59, 60.

The defendant claims that this court has no jurisdiction over maritime torts, and that this action, being one for personal injuries sustained by the plaintiff while on board a ship in navigable waters, is an action for a maritime tort.

By virtue of section 6 of the Municipal Court Code upon the Municipal Court is conferred jurisdiction of actions "for personal injuries" where the amount claimed in the summons does not exceed $1,000 exclusive of interest and costs. It is to be noted that there is no restriction or limitation in this provision of that statute nor is there a restriction in any part of the Municipal Court Code so far as I am aware respecting the place where the personal injury occurred.

Section 2 of article 3 of the Constitution of the United States extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." Section 8 of article 1 of the same Constitution confers upon congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the gov-

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ernment of the United States, or in any department or officer thereof."

By section 9 of the Judiciary Act of 1789 congress, exercising the power conferred by the constitutional provision above quoted, gave to the District Courts of the United States "exclusive original cognizance of all cases of admiralty and maritime jurisdiction; * * * saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." It may be admitted that but for the saving clause in this last quoted provision of the act of congress neither this court nor any other state court would have jurisdiction in an action brought to recover damages for a maritime tort. It is the claim of the defendant that only state courts of general jurisdiction have concurrent admiralty jurisdiction in those cases where the right of a common-law remedy exists and that there must be found an express statutory provision in the case of the municipal court, a court of limited jurisdiction, for the exercise of jurisdiction over the present action, one to recover damages for a maritime tort, conceding the action to be one where the right of a common-law remedy exists.

I believe that the language of the Municipal Court Code in conferring jurisdiction of all actions for personal injuries where the amount claimed in the summons does not exceed one thousand dollars exclusive of interest and costs is sufficiently comprehensive to include actions for personal injuries where the injury occurred upon a vessel in the navigable waters of the city of New York. As before stated, there is no limitation upon the conference of the jurisdiction of actions to recover damages for personal injuries except the limitation respecting the amount of damages recoverable. It is not claimed that any such restriction is to be found in the statute conferring jurisdiction on the Municipal Court.

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In the brief submitted on behalf of the defendant, counsel relies upon the cases of *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, and *Clyde* v. *Walker,* Id. 255, and a number of other cases which are more or less similar in the principle involved. These cases, however, do not seem to me to be authority germane to the point presented on the present case. The principle decided in those cases was that the remedy of the New York Workmen's Compensation Act is a remedy unknown to the common law and incapable of enforcement by the ordinary process of any court, and hence is not among the common law remedies which are saved to suitors from the exclusive admiralty jurisdiction conferred upon District Courts of the United States by the Judiciary Act of 1789. The present action, however, is one which is known at common law and the plaintiff here is merely seeking to enforce an ordinary common law remedy. It would therefore seem to me that the present action is one within the saving clause of the Judiciary Act of 1789. I can see no force in the argument that the common law remedy is saved only to suitors who seek the enforcement of common law remedies in courts of general jurisdiction and not to those suitors who seek relief in a court such as the Municipal Court, a court of limited jurisdiction. Under the laws of the state of New York suitors may pursue these common law remedies where the amount is limited in inferior courts.

The case of *Danielsen* v. *Sigsbee, Humphrey & Co., Inc.,* 115 Misc. Rep. 184, where the Appellate Term of this department held that this court had jurisdiction of an action by a seaman to recover wages, while not perhaps an authority on the point raised in the present action may nevertheless be noted as an indication of the intention of the courts to uphold the jurisdiction under the general language in the statute

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conferring jurisdiction on an inferior court, to wit, the Municipal Court of the city of New York. The jurisdiction of the court was there questioned and it was held an action to recover seamen's wages was within the jurisdiction of the court where the statute conferred jurisdiction in actions on contracts.

I conclude, therefore, that the objection of the defendant to the jurisdiction of the court should be overruled. Upon payment of ten dollars costs the defendant may answer within five days.

Ordered accordingly.

ANNIE PFOTENHAUER, Appellant, *v.* THE EQUITABLE TRUST COMPANY, Respondent.

(Supreme Court, Appellate Term, First Department, April Term — filed May, 1921.)

Banks and banking — failure to establish credit in foreign country — exchange — evidence — plaintiff entitled to return of money paid for foreign credit with interest.

Where the defendant bank, upon payment to it by plaintiff's agent of the sum of $750 at the city of New York on May 10, 1916, for remittance to plaintiff at Dresden, Germany, where she then resided, undertook to establish a credit for plaintiff with a bank at Berlin, Germany, within a reasonable time, to the extent of the equivalent in German exchange of that sum when it was paid to defendant, to wit, 3,902.40 German marks, the plaintiff, notwithstanding defendant's failure to perform its undertaking by reason of war conditions, is entitled to a return of the money with interest.

On July 22, 1920, the defendant, in the course of a letter to plaintiff's agent, stated that it would be pleased to complete the transaction or to refund the value in dollars at the then rate of exchange, to wit, ninety-one dollars and seventy cents. *Held,* that a judgment for that amount granted in an action brought while plaintiff was a resident of New York city will be modified by increasing the recovery to the full amount claimed, with interest from the date of its receipt by defendant.

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APPEAL by plaintiff from judgment of the Municipal Court of the city of New York, borough of Manhattan, ninth district.

Reuben D. Silliman, for appellant.

Murray, Prentice & Aldrich (Winthrop W. Aldrich, of counsel), for respondent.

GUY, J. The case was tried upon an agreed statement of facts from which it appears:

Plaintiff, a native born citizen of the United States, resided in Dresden, Germany, from the year 1913 until December, 1919, and at the time suit was brought resided in New York city. In 1916 plaintiff's financial agent held her securities at Honolulu, collected her income and made remittances to her at Dresden, Germany, through the agent's New York office. Said agent on or about May 10, 1916, paid to the defendant bank at its New York office $750, and defendant thereupon wrote the following letter in duplicate:

"DEUTSCHE BANK,
"Berlin, Germany:

"GENTLEMEN.—On receipt of this letter, please charge our account and pay to

"Mrs. Annie Pfotenhauer
"Reichenbachstr. 2, Dresden A

the sum of Marks Three thousand nine hundred two and 40/100 (3,902.40), by order of Messrs. H. Hackfeld & Co., New York.

"Very truly yours,
"W. BRUCK,
Ass't Secretary.

"(Three copies)

"Delegation Payment—No. 64211
The Equitable Trust Company of
New York."

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One of these duplicates was on May 10, 1916, duly mailed to the Deutsche Bank at Berlin, Germany, and the other to the plaintiff's agent at New York. Plaintiff's agent received the duplicate and mailed it to the plaintiff, but it was taken by the British censor on or about May 20, 1916, and withheld from delivery until on or about July 20, 1920, when it was returned to plaintiff's agent. The duplicate mailed to the Deutsche Bank was never received by the bank, and the non-delivery was not brought about by any act on the part of the defendant. At all times the Deutsche Bank was able and was required by its agreement with defendant to have made the payment called for by its letter if the letter had been received by it.

On or about July 22, 1920, the defendant received from the Deutsche Bank statements of the account of the defendant with said bank indicating that the transfer covered by the transaction between the parties had not been executed; and prior to said date the defendant received no notice of the non-delivery of the letter or of the non-execution of the payment directed thereby. Down to July 31, 1920, the plaintiff had no knowledge that the letters had been mailed to her and the Deutsche Bank or that her agent had made the $750 payment to defendant.

On July 22, 1920, defendant wrote to plaintiff's agent stating that the letter dated May 10, 1916, had not reached the Deutsche Bank and that the so-called delegation payment had not been executed, and asking whether defendant should instruct the Deutsche Bank to make the payment then; that, on the other hand, the dollars paid defendant would not be refunded, for the reason that the non-execution was beyond the defendant's control; and that defendant would be pleased to complete the transaction or to refund the value in dollars at the present rate of exchange. Replying to

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this letter plaintiff stated she was then in New York and she demanded the $750 paid in May, 1916.

The sum of 3,902.40 German marks was on May 10, 1916, at the then current rate of exchange of the value of $750. On July 22, 1920, said number of marks was of the value of $91.70, for which amount the justice granted judgment in favor of plaintiff.

The facts show an undertaking on the part of the defendant to establish a credit for the plaintiff within a reasonable time to the extent of the equivalent in German exchange of $750. Defendant by reason of war conditions failed to perform, and it is but just that plaintiff should have a return of the consideration with interest.

In *Atlantic Communication Co.* v. *Zimmermann,* 182 App. Div. 862, it was held that where a contract for the purchase of a wireless transfer of credit for a certain number of marks which was to be made available for plaintiff's immediate use in Berlin, Germany, could not be performed by reason of war conditions, the plaintiff was entitled to the return of its money. I fail to see any distinction in principle between a wireless transfer of credit and a transfer of credit effected by a letter by whatever name such letter may be designated (*Legniti* v. *Mechanics & Metals Nat. Bank,* 230 N. Y. 415), and defendant's breach entitled plaintiff on obtaining knowledge of the facts to rescind the contract and recover back the consideration paid with interest.

There is a manifest distinction between this case and one of the purchase of foreign money to be remitted by the seller to the country whose currency is purchased. In the latter class of cases where the seller performs, if the money be not actually paid over to the payee, or there be delay in payment without fault on the part of the transmitter, there would seem

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to be a good reason, in the light of the facts showing the contracts in such class of cases, for the purchaser bearing any loss arising from the fluctuation in the value of the foreign currency. *Strohmeyer Arpe Co.* v. *Guaranty Trust Co.*, 172 App. Div. 16; *Fliker* v. *State Bank*, 94 Misc. Rep. 609; *Katcher* v. *American Express Co.*, 109 Atl. Repr. 741.

Judgment modified by increasing the recovery to the sum of $750, with interest from May 10, 1916, with appropriate costs in the court below, and as so modified affirmed, with $25 costs in this court to the appellant.

WHITAKER and WEEKS, JJ., concur.

Judgment modified, and as so modified affirmed, with twenty-five dollars costs to appellant.

MICHAEL E. PATERNO REALTY CO., Appellant, *v.* JOSEPH HATTENBACH, Respondent.

(Supreme Court, Appellate Term, First Department, January Term — filed May, 1921.)

Trespass — when action against tenant for, will not lie — landlord and tenant — bill of particulars.

Under the so-called Emergency Rent Laws of 1920, a landlord cannot, by bringing an action in trespass instead of for rent, deprive his tenant of the right to a bill of particulars and of the other special protection given him under said laws.

Where the landlord in an action in trespass against a tenant who did not remove from the premises on September 30, 1920, the end of his term, establishes the status of the defendant as a statutory tenant who cannot be dispossessed so long as he is ready to pay a reasonable rent, a judgment in favor of plaintiff for the rent at the old rate will be affirmed, although a denial of a motion to dismiss the complaint, on the ground that the action would not lie under the new rent laws, was error.

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APPEAL by plaintiff from judgment of Municipal Court of the city of New York, borough of Manhattan, fifth district, in favor of plaintiff for $266.55.

Frederic H. McCoun (Francis M. Scott, I. Maurice Wormser, W. B. Symmes, Jr., of counsel), for appellant.

Mark Aaron, for respondent.

McCOOK, J. This is an action in trespass brought by a landlord. The defendant was a tenant under a written lease expiring September 30, 1920, and not renewed or extended. The tenant did not remove at the end of his term. The summons bore the indorsement "Action for trespass on and after October 1st, 1920, at 895 West End Avenue."

At the trial, on the opening statement of plaintiff's counsel, defendant moved to dismiss the complaint on the ground that an action for trespass cannot be maintained under the new rent laws during the period ending November 1, 1922, where a tenant is holding over as here. This was refused by the trial justice. The trial then proceeded and plaintiff tried the action on the theory of trespass, and judgment was given for plaintiff, the court below specifying in the decision and judgment that said sum represented October and November rent at the old rate of rental, namely, $133.33 per month, and from this judgment plaintiff appeals.

The plaintiff claims that when a tenant's term expires the landlord may either treat him as a tenant for a new term or as a trespasser. The defendant contends that the action for trespass has been suspended until November 1, 1922, and that the landlord in an action against a holdover tenant is relegated to an

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action for use and occupation in the manner provided by the Emergency Rent Laws.

This appeal raises squarely the question whether under the so-called Emergency Rent Laws a landlord may, by bringing an action in trespass instead of an action for rent, deprive the tenant of the right to a bill of particulars and of the other special protection given him under this legislation. In our opinion he cannot.

Trespass is not expressly mentioned in the rent laws under consideration and plaintiff claims that it cannot be deprived by implication of its right to select this remedy.

An examination of the opinions of the Court of Appeals in the cases of *People ex rel. Durham Realty Corporation* v. *LaFetra*, 230 N. Y. 429; *Guttag* v. *Shatzkin*, Id. 647, and *Levy Leasing Co., Inc.*, v. *Siegel*, Id. 634, decided March 8, 1921, does not disclose that the court has passed expressly upon the point. These opinions do, however, in the course of analyzing the laws in question, describe the intention of the legislature and the effect of the acts in a fashion which leaves no room for doubt.

In *People ex rel. Durham Realty Corporation* v. *LaFetra, supra*, Pound, J., said: "The presumption is created that any demand for rent greater than that in any year prior to such demand is unreasonable and oppressive."

He states that chapter 944 of the Laws of 1920 preserves the action for rent, provides that the plaintiff may recover a fair and reasonable rent for the premises, and further provides that on default of payment of the fair rental value the landlord may obtain possession of his premises by a dispossess warrant.

And again: "No tenant is forced out of his home so long as he pays the fair monthly rent, but a dis-

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possess warrant may be issued if he fails to pay. A comprehensive substitute for the possessory remedies thus becomes the keystone of the arch." The court thus describes what is taken: "What is taken is the right to use one's property oppressively and it is the destruction of that right that is contemplated. * * * The purpose of these laws is temporarily to deprive landlords of all power to enforce covenants to quit in leases, although made prior to the enactment of the laws."

In *Guttag* v. *Shatzkin, supra*, Crane, J., says: "The legislature by the laws in question has simply prevented such a catastrophe by requiring landlords at reasonable rental to keep tenants until normal building conditions have returned."

So far as the present case is concerned, the purpose of chapter 944 of the Laws of 1920 is not differently regarded by McLaughlin, J., when he states in his dissenting opinion in *Levy Leasing Co., Inc.*, v. *Siegel, supra,* that they deny "to the landlord until that time (Nov. 1, 1922), the aid of the courts to obtain possession of the premises leased, where the tenant's lease had terminated or he had defaulted in payment of rent, providing he were willing to pay a reasonable rent, to be determined in a judicial proceeding."

To hold, as plaintiff now asks us to do, that a landlord may bring an action in trespass instead of for rent, and fail before trial to provide a bill of particulars would be to nullify the legislation in question, flood the courts with such actions, and deprive tenants of the safeguards and protection supplied by the legislature and now in effect.

However, in the case at bar, the plaintiff itself offered proof which established the status of the defendant as a statutory tenant, who cannot be dispossessed under the rent laws so long as he is ready

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to pay a reasonable rent. Since the question to be litigated if we reverse because the action is brought on a wrong theory, was already determined on this trial, and as the party who was prejudiced by the court's erroneous ruling does not now complain, it would be a useless procedure to remit the case for another trial.

The judgment is, therefore, affirmed with twenty-five dollars costs.

Judgment affirmed, with twenty-five dollars costs.

NACHMAN KIRSNER, Appellant, *v.* THE STATE BANK, Respondent.

(Supreme Court, Appellate Term, First Department, April Term — Filed May, 1921.)

Banks and banking — money paid for transmission to foreign country — court without power to grant stay until recognition of a government in Russia — depositions — Municipal Court of city of New York — laches.

A sum of money paid to the defendant bank by plaintiff in 1917, for transmission to his wife in Russia, was never paid to her, and soon after her arrival in this country in 1920, plaintiff demanded a return of the money, which was refused. In a Municipal Court action for money had and received, *held*, that the court was without power to grant a motion for a stay "until three months after the recognition of a government in Russia by the United States of America, and the appointment of and the installation of Ambassadors, Ministers and Consuls, so that a commission may issue to take testimony."

Such a stay is too indefinite and uncertain and in effect amounts to a final disposition of the action, and an order granting the motion therefor is appealable and will be reversed and the case set down for trial on a day certain.

The action having been begun on December 10, 1920, the defendant in failing to apply for the issuance of a commission to take testimony, until February 3, 1921, the day the case was set for trial, was guilty of laches.

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APPEAL by plaintiff from an order of the Municipal Court of the city of New York, borough of Manhattan, second district.

Leopold Klinger, for appellant.

Max Silverstein, for respondent.

GUY, J. In 1917 plaintiff paid $360 to the defendant bank for transmission to his wife in Russia. The money was never paid to her; she arrived in this country in 1920, and plaintiff shortly thereafter demanded the return of the money so paid by him to defendant, which demand was refused. The action was begun by plaintiff by the service of a summons on the 10th day of December, 1920, which was endorsed "Money had and received for transmission to foreign country," and an answer was filed on December fourteenth in the form of a general denial and demand for a bill of particulars. No application was made for a stay or for the issuance of a commission to take testimony until the 3d day of February, 1921, when defendant, alleging on affidavits setting forth that under present conditions existing in Russia it was impossible for it to obtain the proof necessary to establish its defense, moved for a stay "until three months after the recognition of a government in Russia by the United States of America, and the appointment of and the installation of Ambassadors, Ministers and Consuls, so that a commission may issue to take testimony," which motion was granted.

The stay granted is so indefinite and so uncertain in duration, its termination being made dependent upon the happening of events which may never happen, that it amounts in effect to a final disposition of the action. We are of the opinion that the court was without power to grant such a stay, and the order

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is, therefore, appealable. We are also of the opinion that the defendant has been guilty of laches in failing to apply for the issuance of a commission until after the day set for trial.

The order must, therefore, be reversed, with ten dollars costs, and the case set down for trial on the 2d day of June, 1921.

WHITAKER and WEEKS, JJ., concur.

Order reversed, with ten dollars costs.

NATHAN RAVITZ, Landlord, Respondent, *v.* ISAAC SIMETZ, Tenant, Appellant.

(Supreme Court, Appellate Term, First Department, April Term — Filed May, 1921.)

Summary proceedings — when final order in, reversed — statutes — co-operative corporations — landlord and tenant — attornment — Laws of 1920, chap. 942.

The co-operative plan of holding property to be used for dwelling purposes, authorized by chapter 942 of the Laws of 1920, must cover the entire building.

Where in a proceeding under said statute to recover possession of an apartment in a building in the city of New York alleged to be owned by a corporation under the co-operative plan authorized by said statute, it appears that the alleged corporation is merely a substitute to evade the statute; that there are two vacant apartments; that several are held under plural ownership; that one was rented without lease or stock as required by the statute; that persons and an outside corporation owning more than one apartment clearly do not want them for their own use but for speculation, and that the petitioner is simply a stockholder in the alleged co-operative corporation claiming to attorn to it for rent collected, a final order in the summary proceeding awarding him possession of the premises will be reversed with costs, and the petition dismissed on the ground that it was established that there was not such "good faith" in the sale of the property to the corporation as the statute requires.

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APPEAL from a final order of the Municipal Court, of the city of New York, borough of Manhattan, sixth district, entered in summary proceedings awarding possession to the landlord.

Ehrich & Mencher (Harry D. Mencher, of counsel), for appellant.

Kahn & Zorn (Louis Frankel, of counsel), for respondent.

WHITAKER, J. This proceeding was brought by the respondent, Nathan Ravitz, to secure possession of the apartment in the building at No. 17 East Ninety-seventh street, Manhattan borough, New York city, known as apartment 2a, from the appellant, who is the present occupant.

Respondent relies upon chapter 942 of the Laws of 1920, to gain possession of the apartment and claims that the entire building is now owned by a corporation under the co-operative plan authorized by chapter 942, *supra*.

It appears from the record that the alleged co-operative corporation is merely a subterfuge to avoid the provisions of the statute as the requirements of the statute for such a co-operative corporation have not been complied with. The co-operative corporation alleged to exist here is not a bona fide organization; if so, it would be the landlord in this proceeding instead of the respondent, Ravitz.

The respondent, Ravitz, is simply a stockholder in the alleged co-operative corporation; and Ravitz claims to attorn to the alleged co-operative corporation for the rent which he collects from the tenant, appellant.

Further proof that the co-operative corporation is not a bona fide organization is found by an examina-

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tion of the other facts set forth in the record and the requirements of the statute.

The statute requires that the property must be "*in good faith* sold to a corporation formed under a co-operative ownership plan whereof *the entire stock* shall be held by the stockholders in proportion to the number of rooms *occupied or to be occupied by them* in such building and all apartments and flats therein *have been leased to stockholders of such corporation for their own personal, exclusive and permanent occupancy to begin immediately* * * *."

There are twenty-nine apartments in this building.

Only five apartments are occupied by persons who own stock to cover them.

There are two vacant apartments in the building, for which no leases have yet been issued.

There are several cases of plural ownership of apartments, as follows:

An outside corporation, Lapidus, Cohen & Kaplan Co., owns stock covering three apartments.

This respondent, Ravitz, owns stock covering two apartments, and has no lease on either one. All the stock on the two apartments is in his own name.

Two other stockholders also own two apartments each.

The by-laws of the alleged co-operative corporation forbid the sale of any stock without the consent of the directors.

It is clear that these stockholders who own more than one apartment cannot occupy more than one apartment at a time for their own "personal" use; and it is equally clear that the corporation of Lapidus, Cohen & Kaplan Co., which owns three apartments cannot occupy them all at once for "personal" use and for dwelling purposes.

Persons and an outside corporation owning more

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than one apartment clearly do not want them for their own use but for speculation, which is what the statute seeks to avoid.

Of the two apartments owned by this respondent, Ravitz, one is occupied by this tenant-appellant, and the other apartment is sub-let by Ravitz to a Mrs. Crystal, as a monthly tenant, and she pays him the rent each month. Mrs. Crystal formerly paid $98 a month and her rent has been increased by respondent over $300 for the year; which rent and increase the respondent now collects. This is not "personal use."

The statute further requires that the co-operative plan must cover the *entire building*. This has not been done. There are two vacant apartments, and several are held under plural ownership.

There is a further direct and clear violation of the statute, in that one apartment known as 1C is entirely left out of the co-operative plan; there is no stock to cover it, and it can be rented without regard to the co-operative provisions of the corporation. It was shown by the testimony of an officer of the alleged co-operative corporation that this apartment, 1C, was occupied by a Mr. Spellman, without lease or stock as required by the statute, which is a violation of the provision that the co-operative plan must cover the *entire* property.

From all the facts disclosed in the proceeding, it is established that there is not such "good faith" shown by the petition as the statute requires, and that the petition and proof do not comply with the terms of the statute.

The final order should, therefore, be reversed, with thirty dollars costs and the petition dismissed.

GUY and WEEKS, JJ., concur.

Final order reversed, with thirty dollars costs.

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JOSEPH VIHART et al., Appellants, v. BROADWAY DEVELOPMENT CORPORATION, Respondent.

(Supreme Court, Appellate Term, First Department, April Term — Filed May, 1921.)

Vendor and purchaser — contracts — false representation as to ownership and location of lots — fraud — trial.

Contributory negligence is no defense to an action for fraud.

After negotiating with defendant for the purchase of two certain lots not owned by it and which were stated to be about one hundred and seventy-five feet away from a certain named avenue, plaintiffs, who were ignorant of the English language, executed a contract prepared by defendant for the purchase of two lots other than those agreed upon on the same street which were not located one hundred and seventy-five feet from said avenue. Subsequently plaintiffs, in reliance upon defendant's false representations as to the ownership and location of the lots negotiated for and that there was gas and a sewer in the street, erected a building upon said lots. In an action for fraud, *held*, that a charge to the jury that the false representation that there was a sewer and gas in the street was waived by plaintiffs because not mentioned in the contract of sale, was erroneous.

A holding of the trial judge that plaintiffs before erecting the building should have examined their contract and the map therein referred to, was also erroneous, as the plaintiffs had a right to assume that the defendant would incorporate into the contract the actual agreement of the parties.

Assuming that plaintiffs were careless or negligent in not reading the contract and having the property surveyed or located before attempting to build thereon, this would not protect defendant from its wilful fraudulent acts.

Judgment dismissing the complaint entered upon an order setting aside the verdict of the jury in plaintiffs' favor reversed and new trial ordered.

APPEAL by the plaintiffs from a judgment in favor of defendant entered upon an order setting aside the verdict of a jury in the Municipal Court of the city

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of New York, borough of Manhattan, sixth district, and dismissing the complaint.

O. H. Droege, for appellants.

Anthony La Gattuta (John Leary, of counsel), for respondent.

WHITAKER, J. The action is based upon fraud. The plaintiffs allege that they purchased certain lots of defendant; that the defendant took plaintiffs to the lots Nos. 58 and 59 on Murdock avenue, which were 175 feet away from Edenwald avenue, and stated to the plaintiffs that those were the lots which the defendant owned and which defendant would sell to the plaintiffs; that there was gas and a sewer in the street. That plaintiffs relying upon those representations purchased the lots. The record shows that these representations were false. Plaintiffs, as they testify, with the knowledge and consent of the defendant began the erection of a building upon the lots, after the contract of purchase was signed, and spent several hundred dollars thereon. The defendant did not own these lots which were numbered 58 and 59, but procured by purchase lots Nos. 35 and 36, which were not located 175 feet from Edenwald avenue, and inserted those lots in the contract of sale. The plaintiffs being ignorant of the English language did not know that defendant was not describing in the contract of purchase the lots which were pointed out to them and which they supposed they were contracting for.

The record discloses a clear case of fraud practiced upon the plaintiffs, and the jury has so found. While there are errors in the charge to the jury to which plaintiffs duly excepted, it is unnecessary to consider them in view of the grounds stated by the learned

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justice upon which he set the verdict aside, which were as follows:

"The plaintiffs negotiated with the defendant for the purchase of two certain lots and thereafter executed a contract agreeing to purchase lots Nos. 35 and 36 as designated on 'Edenwald Map.' Subsequently plaintiffs erected a building on two lots 175 feet from Edenwald Avenue, claiming they were the lots purchased. They seek damages in fraud on the ground that they purchased the lots on which they erected the building, also that defendant represented that sewer and gas mains were in Murdock Avenue; the contract was silent on sewers and gas.

"Lots 35 and 36 are situated on the same avenue and block as the lots on which the plaintiffs erected the building.

"It was the duty of plaintiffs to examine their contract and the map therein referred to before erecting the building. The defendant is not liable for the plaintiff's omissions or mistakes. Motion made at close of defendant's case to dismiss complaint is granted."

The learned court we think erred in assuming that the false representation that there was a sewer and gas in the street was waived by the plaintiffs because it was not mentioned in the contract of sale. So we think also that the court erred in holding that the plaintiffs were required to examine their contract and the map therein referred to before erecting a building. The plaintiffs had a right to rely upon the positive statements of the defendant, and to assume that when the defendant itself drew the contract of sale, it would incorporate therein the actual agreement of the parties. Especially is this so when, as the record discloses, the plaintiffs by reason of their ignorance of the language in which the contract was drawn, relied

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upon the defendant's honesty in drawing the contract in accordance with the terms verbally agreed upon.

The grounds upon which the learned justice set aside the verdict are not those which the law will recognize and approve. As was said by the Court of Appeals in *Wilcox* v. *A. T. & T. Co.*, 176 N. Y. 115, and which doctrine the courts have continued to approve: "It is certainly not just that one who has perpetrated a fraud should be permitted to say to the party defrauded when he demands relief that he ought not to have believed or trusted him."

Even assuming that the plaintiffs were careless or negligent in not reading the contract and having the property surveyed or located before attempting to build thereon, which failure seems to impress the court and also one of the jurors judging from the question asked by one of them, this would not protect the defendant from their wilful fraudulent acts. Contributory negligence is not a defense to an action of fraud. *Hudson Iron Co.* v. *Mershon*, 149 App. Div. 556.

Judgment reversed and a new trial ordered, with thirty dollars costs to appellant to abide event.

ELIAS KAPLAN and JACOB KAPLAN, Respondents, *v.* SAMUEL BERNSTEIN, Appellant.

(Supreme Court, Appellate Term, Second Department, April Term — Filed May, 1921.)

Summary proceedings — when tenant waives right to object to defects in proceedings — jurisdiction — landlord and tenant — Code Civ. Pro. § 2231(1-a).

The technical rules that once were in vogue in summary proceedings should no longer prevail. (P. 418.)

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The amendment (Laws of 1920, chap. 942) to section 2231 of the Code of Civil Procedure consists of the insertion of a new subdivision, 1a, which provides "No proceeding as prescribed in subdivision 1 of this section shall be maintainable to recover the possession of real property * * * occupied for dwelling purposes except * * * or a proceeding where the owner of record of the building being a natural person seeks in good faith to recover possession of the same * * * for the immediate and personal occupancy by himself and his family as a dwelling." *Held*, that in a summary proceeding against a tenant holding over based upon the claim that one of the landlords wished the property for his own residence, it was not necessary that the petition should allege either that the landlord is a "natural person" or the "owner of record" of the property. (Pp. 415–417.)

The court having general jurisdiction of the subject matter the failure to allege any fact essential to give jurisdiction of the person might be waived by the tenant. (P. 418.)

Where the tenant made no mention of the alleged defect in the petition until after the trial had closed and then not until it was pointed out by the court and the landlord's deed showing that he was the owner of record of the property was received in evidence without objection, the landlord's right to maintain the proceeding was fully established and the tenant's right to object to the petition as defective was waived. (Id.)

APPEAL by the tenant from a final order of the Municipal Court of the city of New York, borough of Brooklyn, second district, entered in favor of the landlords after a trial before the court without a jury.

E. Ivan Rubenstein (A. I. Nova on the brief), for appellant.

Joseph J. Dreyer, for respondent.

CROPSEY, J. The proceeding was based upon the holding over by the tenant and upon the claim that one of the landlords wished the property for his own residence. Upon this appeal the sole error claimed is that the petition is defective in that it fails to state

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that the landlord is a "natural person" and the "owner of record" of the property. And it is further claimed that the omission cannot be waived, and thus that the court did not acquire jurisdiction.

The objection that the petitioner should allege that he is a natural person is nonsensical. The petition shows that it is made by an individual, and hence it appears that the petitioner is a natural person, although those words are not used. The question remains whether the petition must allege that the landlord is the "owner of record." Section 2235 of the Code of Civil Procedure specifies what the contents of a petition in summary proceedings must be. It says the applicant must present a written petition "stating the facts which according to the provisions of this title authorize the application by the petitioner." This section was not amended by any of the recent housing legislation. Chapter 942 of the Laws of 1920 contains the provision which is in question here. That was an amendment to section 2231 of the Code of Civil Procedure, and consisted of inserting a new subdivision, 1a. The material part of that reads as follows:

"* * * no proceeding as prescribed in subdivision 1 of this section shall be maintainable to recover the possession of real property * * * occupied for dwelling purposes except a proceeding to recover such possession upon the ground that the person is holding over and is objectionable, in which case the landlord shall establish to the satisfaction of the court, that the person holding over is objectionable; or a proceeding where the owner of record of the building, being a natural person seeks in good faith to recover possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or a proceeding where the petitioner shows to the satisfac-

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tion of the court that he desires in good faith to recover premises for the purpose of demolishing the same with the intention of constructing a new building * * *; or a proceeding to recover premises constituting a part of a building and land which has been in good faith sold to a corporation formed under a co-operative ownership plan * * *."

Subdivision 1 of the section referred to covers the cases of tenants holding over after the expiration of their term. In no part of the new subdivision 1a is there any requirement that the matters therein specified shall be stated in a petition. It is stated that if the tenant is objectionable, that fact shall be established "to the satisfaction of the court," and also if the landlord seeks possession for the purpose of demolishing the building he must show that "to the satisfaction of the court." Though there is no such statement with regard to the clause providing for the maintenance of such a proceeding where the owner seeks in good faith to recover possession as a dwelling for his family, it must be assumed that the section means that those facts must be shown to the satisfaction of the court. But that does not necessarily mean that they must be alleged in the petition.

That the legislature did not intend to require the petition to contain these allegations is indicated by the language of chapter 945 of the Laws of 1920. That act amended subdivision 2a of section 2231, and was passed at the same time as chapter 942. The material part of that subdivision reads: "No proceeding as prescribed in subdivision 2 of this section shall be maintainable to recover the possession of real property * * * occupied for dwelling purposes, *unless the petitioner alleges in the petition and proves* that the rent of the premises * * *" etc.

This subdivision 2a was first enacted by chapter 139

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of the Laws of 1920, passed in April of that year, and it then contained the same language as above quoted. But that does not detract from the force of the contention, that when the legislature enacted chapter 942 and did not put in any such language, it did not mean to require the petition to allege the facts mentioned in that chapter. Subdivision 2a was before the legislature at the time subdivision 1a was enacted and, as has been stated, subdivision 2a was amended at the same time that the other subdivision was inserted. The difference in the language in these two subdivisions lends force to the contention that while in any proceedings brought under subdivision 2 (those based upon default in the payment of rent), the petition must allege the facts required by subdivision 2a; in proceedings brought under subdivision 1 (those based upon holding over), the petition need not allege the facts stated in subdivision 1a.

Appellant contends that the decisions in the First Department with reference to the constitutionality of the housing laws hold otherwise, and he refers to *People ex rel. Brixton Operating Corporation* v. *La Fetra,* 113 Misc. Rep. 527. But that opinion dealt merely with the constitutionality of the enactment and not with the question of pleading. In *Kahrs* v. *Eygabroad,* 114 Misc. Rep. 395, the opinion says (p. 397): "Not only must his petition allege but the proof must show the good faith animating him in seeking to obtain the use of the property for personal purposes." This statement, however, had nothing to do with the decision. The tenant below had been successful and the appeal was by the landlord, and the decision of the Appellate Term was that it was error to exclude testimony showing intent and good faith of the landlord. No question of pleading or sufficiency of the petition was involved.

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Moreover, the Court of Appeals has held that the technical rules that once were in vogue in these proceedings should no longer hold. *Reich* v. *Cochran*, 201 N. Y. 450.

But even if the petition should have stated that the landlord was the owner of record, the tenant has waived his right to raise the point. The court below had general jurisdiction of summary proceedings, that is, of the subject matter. And, therefore, the failure to allege the service of a notice or of any other fact essential to give jurisdiction of the person, may be waived by the tenant. *Crane* v. *Van Derveer*, 45 App. Div. 139; *Cutting* v. *Burns*, 57 id. 185, 191; *Peabody* v. *Long Acre Square Building Co.*, 112 id. 114, 119; *Shaffer* v. *Riseley*, 114 N. Y. 23.

The tenant made no mention of the point under discussion until after the trial was closed, and then not until it was pointed out by the court. When the landlord offered his deed in evidence, which showed that he was an owner of record, the tenant's counsel said there was "no objection" and it was received. This established the landlord's right to maintain the proceeding beyond all question. The acts of the tenant constituted a waiver of his right to now say that the petition was defective. See *Matter of Steele*, 154 App. Div. 860.

KELBY and MANNING, JJ., concur.

Final order affirmed, with ten dollars costs.

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DORA NEEDELMAN, Landlord-Respondent, v. MORRIS LEVINE, Tenant-Appellant.

(Supreme Court, Appellate Term, Second Department, April Term — Filed May, 1921.)

Summary proceedings — non-payment of rent — when court has power to adjudicate reasonable amount of rent — landlord and tenant — statutes — Code Civ. Pro. §§ 2231, 2244.

Where the petition in a summary proceeding under section 2231 of the Code of Civil Procedure as amended by chapter 945 of the Laws of 1920, for nonpayment of rent, alleges that the rent involved is no greater than the amount for which the tenant was liable for the month next preceding his default, and the tenant pleads that the rent demanded is unjust and unreasonable and that the agreement, therefore, is oppressive, the court, upon findings that such rent is excessive, has power under section 2244 of the Code of Civil Procedure, as amended by chapter 137 of the Laws of 1920, to adjudicate what is the reasonable amount of rent.

APPEAL by the tenant from a final order entered in the office of the clerk of the seventh district Municipal Court of the city of New York, borough of Brooklyn, in a summary proceeding for nonpayment of rent.

Emanuel Mehl, for appellant.

Respondent in person.

MANNING, J. This is a proceeding brought by the landlord to recover possession of premises. The petition alleges a hiring for the term of one month and monthly only; an agreement on the part of the tenant to pay the landlord the sum of thirty-five dollars monthly in advance; a default in payment of said rent; and it further alleges that the rent of the premises involved is no greater than the amount for which the

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tenant was liable for the month preceding the said default. The proceeding therefore was brought under section 2231 of the Code as amended by chapter 945 of the Laws of 1920. Under that statute the tenant pleaded the defense that the rent mentioned in the petition is unjust and unreasonable, and that the agreement under which the same is sought to be recovered is oppressive. The landlord then within five days of the filing of the answer, filed a bill of particulars, as prescribed by chapter 945 of the Laws of 1920. After the trial the trial justice found that the rent reserved in the agreement was excessive, and that the reasonable rent for such premises was the sum of twenty-five dollars a month instead of thirty-five dollars as agreed.

On appeal the tenant challenges the power of the court in such a special proceeding to adjudicate what is the reasonable amount of rent. It is true that there is no express delegation of power in chapter 945 of the Laws of 1920 giving the trial justice the right in express terms to decide what is the reasonable amount of rent. Such a power is delegated in chapter 944, which relates to actions to recover for rent only. However, chapter 132 of the Laws of 1920 amended section 2244 of the Code of Civil Procedure to read as follows:

"SECTION 1. Section twenty-two hundred and forty-four of the code of civil procedure is hereby amended to read as follows:

"§ 2244. Answer. At the time when the precept is returnable without waiting as prescribed in an action before a justice of the peace, or in a district court in the city of New York, the person to whom it is directed or his landlord, or any person in possession or claiming possession of premises, or a part thereof, may answer, orally or in writing, denying generally the allegations, or specifically any material allegation of the petition, or setting forth a statement of any new

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matter constituting a legal or equitable defence, or counterclaim. Such defence or counterclaim may be set up and established in like manner as though the claim for rent in such proceeding was the subject of an action. If the court finds that a defence or counterclaim has been established in whole or in part, it shall, upon rendering a final order, determine the amount of rent due to the petitioner or make such other proper disposition as shall determine the rights of the parties, and may give affirmative judgment for the amount found to be due on the counterclaim. If such answer be oral the substance thereof shall be endorsed upon the petition.

"§ 2. This act shall take effect immediately."

Under this statute the court found that the tenant's defense of unreasonableness was sustained. The court then adjudicated that twenty-five dollars was a reasonable amount of rent for the premises in question. We think the court had this power under the section above quoted, and more especially under that part of the statute which reads as follows: "If the court finds that a defence or counterclaim has been established in whole or in part, it shall, upon rendering a final order, determine the amount of rent due to the petitioner *or make such other proper disposition as shall determine the rights of the parties.*"

An adjudication that twenty-five dollars was a reasonable rent was a proper disposition of the issue that determined the rights of the parties.

KELBY and CROPSEY, JJ., concur.

Final order affirmed, without costs.

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DORETHEA S. POETZSCH and FRIEDA H. S. FLEGE, Plaintiffs, *v.* MARTIN MAYER and KATHARINA MAYER, his Wife, Defendants.

(Supreme Court, New York Special Term, May, 1921.)

Vendor and purchaser — title — when encroachments do not make title unmarketable — tax sales — easements.

Specific performance — action to compel — title — when plaintiff entitled to judgment.

The fact that the walls of a building which encroaches upon adjoining premises may remain undisturbed so long as the building, which had been erected over fifty years stands, does not make the title unmarketable.

An exception to taking title arising to a great extent from the difference of opinion of surveyors as to the location of ancient monuments, is of minor importance and in no way affects the marketability of the title to premises located in the older sections of the city of New York.

Tax sales invest the purchaser with only that title which the owner of the property had and the owner of an easement therein which was lawfully acquired prior to the levying of the tax under which the tax sales were made, is not divested of his property right in the easement.

In an action to compel specific performance of a land contract, it appeared that the premises adjoining on the south, and on which the premises in suit encroached eight and one-half inches, had been used for over a hundred and twenty years as an open alleyway and drive, and that the purchasers of the lots bounding thereon and their grantees have an easement therein. It further appeared that, although prior to 1893 the alley was not assessed by the city of New York, it was taxed from that year to 1915, when the assessment thereof ceased, and though it was sold several times for unpaid taxes no action to foreclose the tax liens had been brought. *Held*, that the purchaser at either of the tax sales took the title burdened with the easement of the purchasers of the lots adjoining the alley and that the encroachment complained of in no sense makes the title unmarketable, and plaintiff is entitled to judgment.

ACTION for specific performance of a contract for the sale of real estate.

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Darwin J. Meserole, for plaintiff.

Charles W. Walter, for defendant.

COHALAN, J. This action is one for the specific performance of a contract for the sale of real estate situated in the county of New York. On the day and hour set for the closing of the title and delivery of the deed the defendants rejected the title on the ground that the same was unmarketable because of certain encroachments on adjoining properties. The title company examining the title raised six survey exceptions. The second and fourth exceptions do not make the title unmarketable. It appears from these exceptions that the walls of the premises in the instant case encroach upon the premises adjoining on the east and north. These walls have been erected for over fifty years and may remain undisturbed so long as the building stands. The third and sixth exceptions are such as are frequently found to exist in nearly all premises located in the older sections of our city and arise to a great extent from the differences of opinion of surveyors as to the location of ancient monuments. These exceptions are of minor importance and in no way affect the marketability of the title. Under exception one it appears that the southerly walls of the premises in question encroach eight and one-half inches on the premises adjoining on the south. This exception standing alone would not make the title unmarketable, for the same reasons that are given under exceptions two and four above, but under this exception we are faced with an additional difficulty. The premises adjoining on the south and on which the encroachment is made have for over 120 years been used as an open alleyway and drive. Prior to 1799 the premises adjoining this alley, together with the alley, were owned by one Sharpless, who laid out this alley and sold the lots

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adjoining the same to various owners, providing in the deeds of conveyance that the alley was to be used in common by the inhabitants of the lots adjoining. The description in the deed out of Sharpless of the premises reads: "And southerly by cartway 8 feet wide, running from Chapel street, and to be used in common by the inhabitants of lots adjoining." Prior to 1893 this alley was not assessed by the city of New York, and was shown on the land map of the city as an alley. From 1893 to 1915 it appears on the tax maps as lot 15 and was taxed during those years, and in June, 1907, the premises were sold for unpaid taxes for the years 1893 to 1907, amounting to approximately $1,800, and in 1913 were sold for unpaid taxes for the years 1907 to 1913. No action has been brought for the foreclosure of these tax liens. In 1915 it appears the city authorities ceased to assess this alleyway for taxes. The defendants contend that the encroachment in exception one is on property sold under the above tax sales and that they should not be compelled to accept title with this lien outstanding. The purchasers of the lots bounding on this alley and their grantees have an easement therein which is a property right. The purchasers at any tax sale and any sale in foreclosure of the liens could acquire no better title than the owner of this lot. They took the title burdened with this easement and property right. If they had no actual notice, they had constructive notice, as the recording act clearly applies. Tax sales and sales in foreclosure of tax liens invest the purchaser with only that title which the owner of the property had; it cannot divest a party situated as the plaintiff is here from a property right such as the easement is here and which was lawfully acquired prior to the levying of the tax under which the sales were made. To hold otherwise would infringe on the plaintiffs' constitutional rights and deprive them of their prop-

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erty rights without due process of law. *Blenis* v. *Utica Knitting Co.*, 73 Misc. Rep. 61; affd., 149 App. Div. 936. If the liens could be foreclosed and the property sold thereunder, the best position that the buyer could be in would be no better than that in which are the owners of the property on the north, which encroaches at least a foot, and there is no doubt in that instance but that the walls, having been standing for over fifty years, would be allowed to stand so long as the building remains. It follows, therefore, that the fact of the tax sales being outstanding on the alley on which the building encroaches eight and one-half inches in no sense makes the title unmarketable. The claim on the part of the defendant that he should not be required to accept property the possession of which he may be required to defend by litigation is not applicable for the above reasons.

Judgment for plaintiff.

RICHARD B. WHITING, as Surviving Executor of the Will of WILLIAM RICHARD DENHAM, Deceased, Plaintiff, *v.* HUDSON TRUST COMPANY, EDITH C. ECKERSON, as Executrix of the Last Will and Testament of JOHN C. R. ECKERSON, Deceased, and HOWARD C. TAYLOR, as Agent and Representative of the New York Supreme Court to Execute the Trusts Created by the Last Will and Testament of JOSEPH H. SNYDER, Deceased, Defendants.

(Supreme Court, New York Special Term, May, 1921.)

Banks and banking — when trust company liable for the misappropriation of funds by an executor, one of its depositors — executors and administrators.

Where a trust company, without investigation, permits checks payable to one of the two executors of an estate to be deposited to what was virtually his personal special account,

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each and every item of which was the property of the estate, the trust company is guilty of such negligence as amounts to practically a participation in the diversion or misappropriation of the funds of said estate, and in an action by the surviving executor, though he was negligent in confining the entire charge of the estate to his coexecutor, the trust company is liable not only for the balance of the account with interest but to account for the entire fund deposited and to have judgment rendered against it for any moneys disbursed and for which it might be liable by reason of its having participated in their diversion.

Where a part of the fund so deposited with the trust company was transferred by plaintiff's co-executor to the credit of another estate of which he was trustee by a check drawn by him and deposited in the account of said estate with the same trust company, an amount paid therefrom by him for lawyers' and brokers' fees on the sale of a bond and mortgage belonging to said trust estate, the trust estate is not chargeable therewith in the absence of proof that the estate of the co-executor was released, and the trust company remains liable to plaintiff therefor, with interest. But for the amount of two checks drawn by the co-executor out of the special account and payable to the trust estate that estate is liable.

ACTION to recover funds misappropriated by an executor.

Gilbert D. Lamb, for plaintiff.

Holm, Whitlock & Scarff, for Hudson Trust Company.

Robert J. Mahon, for Edith C. Eckerson, executrix.

Mackintosh Kellogg, for Howard C. Taylor as agent, etc.

COHALAN, J. This action is brought to recover a fund of $48,959.49 and interest, deposited in the Hudson Trust Company in the years 1915 and 1916 by one Eckerson, then a coexecutor with the present plaintiff under the will of William R. Denham, deceased. Of

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this fund there is now remaining on deposit approximately $11,000. Of the balance $29,195 was transferred by Eckerson to the estate of one Snyder by check drawn to the order of said estate and deposited in that estate's account in the same trust company. There was also paid out of this fund by Eckerson $1,385, fees of lawyers and brokers in the sale of a bond and mortgage belonging to the Snyder estate. The balance of this fund, approximately $7,400, it is claimed, was paid out for purposes other than for the benefit of the Denham estate. The plaintiff seeks to recover from the Hudson Trust Company the balance on deposit with it, together with trust company interest from October 21, 1916; to obtain a judgment against the Snyder estate for the amount of the trust fund received by it, with legal interest from June 1, 1916, and for the additional sum of $1,385 expended for the use of that estate, with interest thereon; to obtain an account from the trust company of the entire fund deposited with it and judgment against the trust company for any moneys disbursed and for which it may be liable by reason of its having participated in such diversion with the depositor, with notice of the misappropriation. There is also the usual prayer for general relief. Eckerson for many years prior to the death of Denham and up to the time of his own death had been a trustee of the Snyder estate, having been in its early days its executor, and had been acting as attorney-in-fact for Denham from April, 1915, to Denham's death in September of that year, and after his death and the probate of his will became one of the coexecutors with the plaintiff. The power of attorney that Eckerson had from Denham was a broad one and authorized him to draw checks on the Denham bank accounts, to open new bank accounts for Denham, to have access to his safe deposit box containing his

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securities and to do many other things unnecessary to mention here. A few days prior to Denham's death Eckerson drew a check for $7,000, payable to himself as trustee, and signed it "William R. Denham, by John C. R. Eckerson, attorney-in-fact." This check was made out on one of Denham's printed checks and drawn upon the United States Mortgage and Trust Company, and on its face showed that Eckerson was acting in a representative capacity both as maker of the check and as payee. The signature on the check indicated that he was acting under the power of attorney and his authority was manifest from the instrument creating it. It was shown at the trial that Eckerson was authorized to draw this money for the use of the Denham estate in the event of a delay in the probate of the will. This agency and use of the money terminated with Denham's death. Prior to the deposit of this check, but on the same day, Eckerson telephoned the trust company — where he already had the following accounts: *First.* "Estate of Joseph H. Snyder, John C. R. Eckerson"; *second,* a personal account; *third,* an account, "John C. R. Eckerson, agent" — and talked to Purdy, expressing a desire to open an account to be kept separate from the other accounts, and Purdy, of the trust company, claims he mentioned the word "special." Purdy testified that the check when presented for deposit indicated to him that it was a trust and that for that reason he inquired of Eckerson whose money it represented and that Eckerson said it was his own. Purdy, it seems, made no further investigation and allowed Eckerson to open a new account, "John C. R. Eckerson, special," with this check. Purdy could see that the check was drawn by an attorney-in-fact, payable to himself as a trustee, and payable out of moneys of the creator of the power, and he should

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have made further investigations before allowing the check to be deposited in what was virtually a personal account. Had he communicated with the United States Mortgage and Trust Company the present action undoubtedly would not have arisen, as he would have been made aware of the terms of the power of attorney and in all probability the reasons for the particular trust, and would thus have seen the fallacy of Eckerson's statement, and the check, if deposited, would have been deposited properly in a trust account. Purdy, allowing this check to be deposited in this special account without any other investigation than Eckerson's word, was certainly negligent, and the negligence was not confined to this incident, as will be seen later. The subsequent withdrawals from this account show the intent of Eckerson in depositing the money as he did, and these various checks, so drawn, should have put the trust company on its guard. Some years prior to the death of Denham a firm of brokers had purchased for him, in addition to the bonds in Denham's deposit box in 1916, certain bonds, and these identical bonds were in the month of April, 1916, brought to this same firm of brokers by Eckerson and sold by that firm for $18,817.26. Three checks were given to Eckerson for that amount and deposited by him in this special account. There is no doubt that these bonds so sold were the bonds of the Denham estate, and it is clearly shown by the testimony of McDonald and Hamon that they must have been removed from the safe deposit box by Eckerson between the date of the execution of the power of attorney and Denham's death and kept somewhere by Eckerson up to the time they were sold by the brokers. This is further substantiated by a letter of Denham to Eckerson directing the selection of certain bonds for use in accordance with some unknown instructions.

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In May, 1916, other bonds taken from the safe deposit box of Denham were sold by Eckerson through the same brokers for $22,468.54. This sum also was paid to Eckerson by checks made payable to him as executor, and these checks were likewise deposited in this special account. Here again the trust company permitted checks payable to an executor to be deposited to what was virtually a personal account. There is nothing to show any investigation by the trust company with regard to these checks. About a month prior to the deposit of the proceeds of the sale of the bonds the Denham estate had opened an account in the same trust company, but these checks were not deposited in that account. Eckerson had a method in his madness and deposited in this account each check and amount received from the property of the Denham estate, and presumably the small doubtful items were property of the same estate. It is unnecessary to go into each one of the items that make up this special account, as it is my belief they were each and every one of them Denham estate property. Prior to Denham's death an action was commenced by one Wells against Eckerson as trustee of the estate of Snyder, and an interlocutory judgment was entered on or about April 20, 1916. It would appear that in February or March of that year Eckerson had filed an account in that action, and under the judgment he was directed to pay to certain beneficiaries under the will certain sums. The same week the bonds above referred to were sold by Eckerson, and the money for the same deposited in the special account. About three weeks after the entry of judgment, and two weeks after the sale of the bonds and deposit in special account, Eckerson drew checks on this special account and deposited the amounts in the Snyder estate account. I think the entire question, in so far as the liability of the Snyder

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estate is concerned, depends entirely upon notice. Eckerson at the time of the transfer was the trustee for both estates and, as the trustee of the Snyder estate, had knowledge of his misappropriation of moneys from the Denham estate. The Snyder estate claims that the judgment entered against Eckerson in the Wells action, Eckerson having made a payment according to that judgment, the plaintiff here cannot hold the Snyder estate. To support this contention they cite English cases and the dicta in the Massachusetts case. I believe, however, that the previous cases are distinguishable from the present and that the present case follows more after *Atlantic Mills* v. *Indian Orchard Mills,* 147 Mass. 268. It is conceded that the Snyder estate at the time the present agent went into possession had approximately $7,000 on deposit in the Hudson Trust Company account. It is also conceded that at the time of the trial there was upwards of $50,000 in the hands of Taylor. After a careful review of the contentions of the parties herein I believe the Snyder estate to be liable for the amount of the two checks drawn out of the special account and payable to the Snyder estate, and in so deciding I am mindful of the fact that the present plaintiff is very negligent of the duties as executor in confining the entire charge of the estate to Eckerson and in not keeping track of it, as appears to be the fact. As to the liability of the Hudson Trust Company, I think enough has been shown to hold them liable for their negligence, which amounted to practically a participation in the diversion or misappropriation of the funds belonging to the Denham estate. It knew or should have known that the check opening the original special account was trust money, and the maker, acting in a trust capacity, making himself the payee of the check as trustee certainly should have put the trust company

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on its guard, and it should have made investigations beyond the conference with Eckerson himself. Later, when the checks came from the brokers payable to Eckerson as executor, it again permitted him to deposit them in the special account, which was virtually a personal account, without making any investigation or without questioning the deposit of the checks in that account. Subsequently it knew or should have known that Eckerson was using this special account for his own personal matters, as shown by the garage check and others, and, furthermore, it knew that out of this account were drawn two very large amounts on or about the same time that the proceeds of the bond sale were deposited, which were deposited immediately in the Snyder account in their own company. All these transactions should have put it on guard that Eckerson was commingling trust funds and executor's funds and drawing upon them for his personal matters. I am constrained to hold this company liable to the extent prayed for. The moneys expended by Eckerson for the sale of the mortgage in question are not chargeable to the Snyder estate. There is nothing shown to release Eckerson estate.

Judgment accordingly.

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THE CITY OF NEW YORK, Plaintiff, *v.* GEORGE McANENY, JOHN F. O'RYAN and GEORGE T. HARKNESS, Individually and Purporting to Act as Transit Commissioners and Claiming to Constitute the Transit Commission of the State of New York; ALFRED M. BARRETT, as Public Service Commissioner of the State of New York for the First District and Constituting the Public Service Commission of the State of New York for the First District; and JOHN H. DELANEY, as Transit Commissioner and Constituting the Transit Construction Commission of the State of New York, Defendants.

(Supreme Court, New York Special Term, May, 1921.)

Jurisdiction — courts of equity are not vested with power over appointment or removal of public officers.

Injunctions — when will be denied — transit commission contracts — Laws of 1921, chap. 134.

A court of equity is not vested with power over the appointment and removal of public officers. (P. 434.)

Jurisdiction to determine the title to public office belongs exclusively to courts of law and is exercised either by certiorari, mandamus, prohibition or quo warranto, in accordance with common law procedure or statutory direction. (P. 435.)

The standing of the city of New York in a court of equity in its proprietary capacity is no greater than that of any private litigant. (P. 440.)

The statute (Laws of 1921, chap. 134) creating the transit commission vests it, as successor of the local authority of the city of New York, with power "to approve contracts and modifications of contracts under any provisions of the Rapid Transit Act or any contract heretofore made and in respect of any power or right of approval under any law or contract and including any power or right of approval of modification of any contract" and in case the local authority should finally fail to approve the contract or contracts formulated under a plan of adjustment, readjustment and rehabilitation provided in said statute, "to execute and deliver such contracts in the name and in behalf of the city, with full legal force and effect

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as if all approvals by the local authority or any local officer had been given." *Held*, that in an action by the city for an injunction to restrain the said transit commission from the positive performance of duties and functions transferred to it from pre-existing commissions by virtue of said statute, which said duties and functions it is alleged are in their essence a direct invasion of the constitutional rights and privileges of the plaintiff, the court has no inherent power to right the wrong unless thereby the civil property or personal rights of the city, as a proprietor, in contradistinction from the rights in common of the body of the people of the city, are affected. (Pp. 437–438, 441.)

Where the relief asked for is based upon an allegation that the transit commission, the defendants herein, are about to and will grant new pretended consents under the form of contracts which they will make for and in the name of the plaintiff with various street railroad companies and said contracts will purport to relieve the companies from the obligation of compliance with the provisions, conditions and obligations theretofore imposed and that said defendants will modify and alter provisions and conditions of the contract and restore and validate rights of operation which the local authority has forfeited, and that such acts will result in irreparable financial injury to the plaintiff, its people and inhabitants, the injunction will be denied and judgment rendered for defendants. (Pp. 439–441.)

ACTION for an injunction.

John P. O'Brien, corporation counsel (Hiram W. Johnson, John P. O'Brien, Wm. E. C. Mayer and Edgar J. Kohler, of counsel), for plaintiff.

Argued by Hiram W. Johnson.

Francis M. Scott and Godfrey Goldmark, for defendants.

Argued by Francis M. Scott.

McAVOY, J. The court of equity to which application for relief in this action has been addressed is not vested with power over the appointment and removal of public officers. Jurisdiction to determine title to

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public office belongs exclusively to the courts of law and is exercised either by certiorari, mandamus, prohibition or quo warranto, according to the circumstances of the case and the mode of procedure established at common law or by legislative direction.

There cannot be found a case where a bill of injunction has been granted to restrain the appointment or removal of a municipal or state officer. Upon an early bill in equity in the Court of Chancery of the State of New York by a lawfully appointed officer, charging that he had been ousted of his office by one unlawfully appointed in his stead by the governor and praying for an injunction, a receiver and an account of fees until plaintiff's title to the office could be tried at law, the rule was that "This Court may not have jurisdiction to determine that question so as to render a judgment or decree of ouster of the office." 3 Edw. Ch. 450; 9 Paige, 507.

This was affirmed in the Court of Errors in 7 Hill, 259.

Validity of the removal of a public officer formerly functioning as transit commissioner and the title of the person removed or of the new appointees to the office may be tried by quo warranto or mandamus.

The immediate object of the bill in equity filed by the city is to prevent the removal from office of the former transit construction commission and the intrusion into the office of the newly appointed commission. No question of property is suggested in the allegation of matters of fact in the bill, nor would be involved in any decree that this court could make thereon. It is questionable, too, whether the city either as a political subdivision of the state or as a proprietary corporation has any standing to contest in behalf of the former commissioner the title to office of the present bodies functioning in his place and stead.

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There are no facts appearing here which show that either of the ousted commissioners, whether the public service commissioner, or the transit construction commissioner, are any worse off than any other public officer illegally or improperly removed who has, if aggrieved, an ample remedy at law. If the office is filled by another person, the remedy is by quo warranto; if it be not filled, he may resort to mandamus. *People ex rel. Kelly* v. *Brooklyn*, 77 N. Y. 503; *State ex rel. McDermott* v. *Miller*, 45 N. J. L. 251.

In order to entitle even the party ousted from office to the relief demanded, a case must be presented appropriate for the exercise of judicial power. The rights in danger must be rights of person or property, not merely political rights which do not belong to the jurisdiction of the court, either in law or in equity, and in this state as in all the other states of the Union, with the exception of North Carolina, it is said that there is no property right in public office. *Butler* v. *Pennsylvania*, 10 How. (U. S.) 402.

The court will, therefore, not, in deference to the almost universal ruling, restrain the action of the incumbents, for thus to restrain them is to restrain all the functions of the office. They being in, even if wrongfully, no one else can enter until they are removed and they must act or no one can.

Jurisdiction now vested in the defendants, which will include the powers of the public service commissioner under the Public Service Commissions Law and the powers of the transit construction commissioner under the Rapid Transit Act, may be lawfully transferred from the former state authority to the newly constituted state authority and even if they could not, the equity court could not adjudge the statute unconstitutional unless there was a controversy between litigants where it is sought to enforce rights affecting

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the life, liberty or the property of the litigants before it.

There can be no devolution of power on the courts of the state to render advisory opinions instructing or directing former state officers whether they are or are not legally deposed, or giving confirmation to the assumed authority of the new commissioners.

Apparently the real object of the litigation is to prevent the transit commissioners created under the act known as chapter 134 of the Laws of 1921 from the positive performance of duties and functions which it is alleged are in their essence a direct invasion of the city's constitutional rights and privileges. It is said that if the transit commission proceeds to endeavor to function under the act it will necessarily impose obligations upon them and curtail the powers and abrogate the contracts of the plaintiff in such a way that rights of local self-government contract obligations and security of municipal funds and credits will be impaired and destroyed.

The ground for injunctive relief based upon these apprehensions of the city's authorities are mainly bedded in this prescribed unusual grant to the transit commission whereby it is made the successor of the local authority of the plaintiff, reading, "to approve contracts and modifications of contracts under any provisions of the Rapid Transit Act or any contract heretofore made and in respect of any power or right of approval under any law or contract and including any power or right of approval of modification of any contract" and bestows another unusual devolution of power upon the transit commission in case the local authorities shall finally fail to approve the contract or contracts formulated under a plan of adjustment, readjustment and rehabilitation provided in the act, "to execute and deliver such contracts in the name and in behalf of the City, with full legal force and

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effect as if all approvals by the local authority or any local officer had been given."

These provisions of the act in so far as they vest or appear to invest the transit commission with power to consent to modifications of provisions in existing contracts in which the city has proprietary rights or such devolution of power to consent to changes, rehabilitations, combinations of routes, traffic arrangements, etc., as theretofore has been confided to local authority by the Constitution of the state in article III, section 18, may involve justiciable questions ultimately because it would seem confessedly from the act itself there is an ominous foreboding of resistance to these enactments by municipalities in the declaration by the legislative power of the existence of the much vexed "emergency" calculated to lift this particular prescription from the field of obstructive inhibitions of constitutional mandates and provisos.

If and when these matters have gone through the various hearings provided for by the Transit Act and have not, through accommodation to the city's demands, become acceptable to the local authority there is a contract proposed which is either not adapted to or reasonably intended to accomplish the needs arising out of the alleged emergency the court may by injunction interpose to prevent its consummation.

Or if nothing of "emergency" is discernible to the court and the local authority has not accepted or consented to the contracts arising from the proposed plan of adjustment, the proposal may then be made that the court interfere with the adoption by the commission in behalf of the city of such contracts on the grounds now urged or such as may then be applicable. That such discussion now is premature and academic doth appear in this: The act gives the board of estimate the right to approve or adopt the plan. It does

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indeed provide that in the event of ultimate refusal the transit commission may approve, consent or adopt in lieu of such local authority and as though it had given the necessary consent, but conceivably that occasion may never arise. The contracts and adjustments proposed to the board of estimate in the plan of adjustment and rehabilitation may be so grounded in justice to the city as to commend itself to the minds of all rational men.

Is it to be asserted that it will not thus clothed be accepted? The germ of the answer lodges in the question. If it be accepted naught of the city's proprietary nor indeed its political rights are lost or even suspended. If it be not accepted and no right of the city or its people be infringed by its terms, a plan of rapid transit which relieves the present conditions and promises proper expansion for the future may be rejected with so little regard for that exercise of power conferred as to give rise to a public emergency into which the legislature may plunge without restraint excepting that governed by common reason, justice and the course of equity and the law.

The complaint grounds its demand for the inhibition of the injunctive process upon an allegation that the transit commission, these defendants, are about to and will grant new pretended consents under the form of contracts which they will make for and in the name of the plaintiff with various street railroad companies and said contracts will purport to relieve the companies from the obligation of compliance with the provisions and conditions and obligations theretofore imposed and that these defendants will modify and alter provisions and conditions of the contract and restore and validate rights of operation which the local authority, for instance now the board of estimate and apportionment, has forfeited and that such acts will result in irreparable financial injury to the plain-

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tiff, its people and inhabitants, unless thwarted by judicial order.

In determining whether or not at this time the court may interfere with a proposed act, even though it were asserted by the defendants that they were about to do it, it must be remembered that the city's standing in the court of equity in its proprietary capacity is no greater than that of any private litigant. When the government comes as a suitor into a court of equity its claims appeal to the Chancellor with no greater force than do those of an individual under like circumstances. *Bank of United States* v. *Planters' Bank*, 9 Wheat. 904.

There is not one law for the sovereign and another for the subject, not one law for the corporate city and another for its inhabitants. Both stand upon equality before the law, and the city acting for the sovereign state, is merged in the dealer, contractor or suitor. *People* v. *Stephens*, 71 N. Y. 527.

The court has no inherent power to right a wrong unless thereby the civil property or personal rights of the city as a proprietor are affected. The rights to be affected must be personal or proprietary to the city, as distinguished from the rights in common of the body of the people of the city.

The judicial power over the legislative branch of government extends merely to determining controversies in which the civil property or personal rights of the city proprietor is actually affected by a particular determinative act. It may not pass upon the act of a co-ordinate independent department of government until there arises the particular instance in which the limits of power have been attempted to be exercised. The imminence of danger of the execution of contracts that will violate the city's prescribed constitutional rights cannot be before the court for

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even an examination of the legality thereof until they are proposed to be executed.

The preventative jurisdiction of equity does not extend to any proposed illegal official act irrespective of the fact whether the act sought to be restrained involves a waste of public property, violation of public rights or injury to the interest of taxpayers as such. There must be special, peculiar, personal proprietary rights of the municipality affected before the court may interpose the judicial restraining arm.

None of the other grounds of unconstitutionality urged as voiding the act permit the court at this time to interpose against the exercise of the indubitable lawful functions which the legislature had power to transfer from the pre-existing commissions to those which it has now constituted with purely regulative power.

Judgment accordingly.

FRANK H. BAILIE, JR., Plaintiff, *v.* FRANK L. SHELDON, PAUL S. SHELDON, NORTHRUP DAWSON, W. WALLACE LYON and CHARLES E. VAN VLECK, JR., Copartners Doing Business under the Firm Name and Style of SHELDON, DAWSON, LYON & COMPANY, and EDITH B. BAILIE, as Executrix of the Last Will and Testament of FRANK HOWARD BAILIE, Deceased, Defendants.

(Supreme Court, New York Special Term, May, 1921.)

Stockbrokers — misappropriation of stock certificate by an executrix — right of legatee to maintain action against broker for the recovery of stock pledged as collateral by executrix — executors and administrators.

Testator, who at his death was the owner and holder of three certificates of corporate stock for fifteen, sixty and one hundred and fifty shares respectively, bequeathed twenty-five shares to

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his father and twenty-five shares to his mother. One-half of the residue of his estate he gave to his wife with direction that the other half should be held by her in trust until his oldest child should have attained the age of twenty-one years, and that each of his children should receive a proportionate share in said one-half of such residuary estate upon arriving at a like age. About fifteen months after the death of testator his widow, the sole trustee and executrix of his estate, deposited the certificate for one hundred and fifty shares of stock with the defendant firm of stockbrokers to sell, with instructions to purchase other stock for her individual account, and to hold the stock deposited until sold as margin upon her individual purchase, and when sold, to apply the proceeds upon her own purchase of stock. The one hundred and fifty shares of stock deposited were never sold, but are now held as collateral by the stockbrokers who claim a lien thereon, to secure them for the considerable loss which the widow sustained in her purchase of stock through them. In an action against the firm of stockbrokers and the widow as executrix brought by the only child of testator, now of age and entitled to receive one-half of the residuary estate of his father, asking for a construction of the will and that the defendant stockbrokers be ordered to deliver to the executrix possession of the stock certificate deposited with them by her, *held*, that the delivery of said stock certificate for the personal use of the executrix was a misappropriation thereof, except in so far as she may have been entitled to receive a portion of the same as residuary legatee.

When the defendant stockbrokers accepted the stock deposited by the executrix as collateral for her individual account, with the knowledge that the stock certificate was part of the estate of her deceased husband, they joined in such conversion and are answerable therefor as trustees *ex maleficio*.

The plaintiff, while not legally owner of the whole fund, has a right to compel the executrix to pay to him the portion thereof to which he is entitled, and such rights having been impaired by the wrongful action of the executrix and the other defendant, plaintiff may appeal to a court of equity to right the wrong and under the authority of *Van Camp* v. *Fowler*, 59 Hun, 311, the court has jurisdiction to give complete relief and determine the title to the fund in dispute.

ACTION to recover stock certificate held as margin.

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Earle & Todd (Henry M. Earle, Colley W. Bell, of counsel), for plaintiff.

Leonard & Walker (Thomas G. Prioleau, Fred W. Nellis, of counsel), for defendant.

LEHMAN, J. Frank Howard Bailie, the father of the plaintiff, died on or about the 15th day of December, 1915. At the time of his death he was the owner of two hundred and twenty-five shares of the capital stock of the H. K. Porter Company holding three certificates for fifteen shares, sixty shares and one hundred and fifty shares respectively. Under the terms of his will he bequeathed twenty-five shares of this stock to his father and twenty-five shares of the same stock to his mother. He devised and bequeathed one-half of the residue of his estate to his wife Edith B. Bailie and he directed that the other one-half should be held in trust until his oldest child should have attained the age of twenty-one years and that each of his children should receive a proportionate share in the said one-half of such residuary estate upon arrival at the age of twenty-one years. The testator appointed his wife Edith B. Bailie sole trustee and executrix of his estate. The plaintiff is the only child of the testator and is now over twenty-one years of age and therefore entitled to receive one-half of the residuary estate of his father.

It appears that on or about April 14, 1917, Edith B. Bailie deposited the certificate for 150 shares of the H. K. Porter Company stock with the defendant, a firm of stockbrokers doing business under the name of Sheldon, Dawson, Lyon & Co., with instructions to sell the same. At the same time she instructed them to purchase other stock for her individual account and to hold the H. K. Porter Company stock until sold,

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as margin upon her purchase, and when such stock was sold, to apply the proceeds thereof upon the purchase of the stock which she directed them to buy for her account. The stock deposited with the brokers was never sold by them but is now held as collateral by the stockbrokers who claimed a lien thereon to secure them for the considerable loss which Edith B. Bailie sustained in the purchase of stock through them.

The plaintiff has never received his share of the residuary estate and he now asks that the defendant firm of stockbrokers should be ordered to deliver possession of the stock certificate held by them to the defendant Edith B. Bailie as executrix of his father's estate.

At the time that the stock certificate was delivered to the brokers, they had full notice and knowledge that it was part of the estate of Frank H. Bailie, deceased. With such knowledge they permitted the executrix to use the stock as collateral for her personal account. Edith B. Bailie in delivering the stock to the brokers for her personal use undoubtedly misappropriated such stock except in so far as she may have been entitled to receive a portion thereof as residuary legatee and when the defendant stockbrokers accepted the certificate as collateral for her individual account, with knowledge that the stock certificate was part of the estate of her husband, they joined in such conversion and are answerable therefor as trustees *ex maleficio*.

The right of a trustee or substituted trustee of the estate or fund which has suffered through such misappropriation to bring an action at law or in equity against those who participated therein seems well established but the defendants urge that in the present case the plaintiff does not represent the estate and has no such cause of action; or that if the plaintiff has

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a cause of action, the representatives of the specific legatees who are now deceased are necessary parties to the action and that the plaintiff is seeking a wrong remedy. The plaintiff's cause of action herein, if any, is undoubtedly a derivative cause of action. The duty to bring an action rests in the first instance upon the executrix Edith B. Bailie who herself misappropriated the funds. The complaint herein alleges that Mrs. Bailie has refused to bring such action and it would seem that upon such refusal the plaintiff should be permitted to follow either of two courses. He might move in the courts of the state where the will was probated for the substitution of a new trustee who would properly protect the interest of the estate or by appropriate action he might compel the present trustee to proceed against those parties who are wrongfully in possession of the property of the estate. The present action is in effect an attempt to pursue the latter course. He has made the executrix a party to the action and he asks the court to direct the stock-brokers to deliver the property of the estate which they hold, to such executrix. The case of *Van Camp* v. *Fowler,* 59 Hun, 311, is authority for the right of the plaintiff to bring such an action and a court of equity has jurisdiction to give complete relief and to determine in an action to which the executrix is a party defendant, the title to the fund in dispute. That case has never been overruled and seems to me correct on principle. While the present plaintiff is not legally the owner of the fund, he has a right to compel the executrix to pay a portion thereof over to him. That right has been impaired by the wrongful action of the executrix and the other defendants and he should be permitted to appeal to a court of equity to right the wrong from which he is suffering and a court of equity should give complete relief in the one action. It is

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true that in the case of *Van Camp* v. *Fowler, supra,* the action was brought in behalf of all others who might be similarly interested but the only parties in the present case who might be similarly interested are the personal representatives of the testator's father and mother who each received twenty-five shares of stock under the will. It seems to me, however, that these personal representatives are not necessary although they might be appropriate parties to the present action. While they have a similar right to that of the plaintiff, their right is not a common or joint right. The court here is called upon to decide only whether the certificate of stock held by the defendant stockbrokers belongs to the estate of Frank H. Bailie, deceased, and except perhaps indirectly, it need not determine whether these specific legatees have been paid their share of the estate. If the court decrees the return of the certificate, then the specific legatees can enforce whatever rights they may have to share in the estate against the executrix who will then be in possession of the stock. If they have not been paid they will share in the distribution of the fund. If they have been paid then they have no interest in this litigation. In any event as against this defendant, since they would have only a derivative right, the delivery of the certificate to the executrix would be binding against them and a decision in an action in which the executrix who properly represents them is a party, that the defendant stockbrokers have no such property would be equally binding. The court therefore has before it the parties necessary for a complete determination of the issues and the defendants cannot object to the non-joinder of the specific legatees.

The court cannot, upon the proof presented, grant the exact relief which the plaintiff herein demands.

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The executrix was undoubtedly entitled individually to one-half of the residuary estate of the testator. There were two hundred and twenty-five shares of the H. K. Porter Company stock in the estate of the testator. Fifty shares of stock were bequeathed specifically to the testator's parents so that the executrix was entitled to receive eighty-seven and one-half shares from the estate and as executrix she had the right to transfer such shares to herself as an individual. Assuming but not at present deciding that she has appropriated to her own use the seventy-five shares not covered by the certificate which forms the subject matter of the present dispute, she still was entitled to twelve and one-half shares covered by that certificate. When she delivered that certificate to the stockbrokers for her individual use, such delivery constituted, in my opinion, an appropriation of such shares of stock as she was entitled to pay over to herself individually. The estate thereafter had no interest in those shares appropriated by the executrix as part of her own individual legacy even though they constitute part of the certificate originally belonging to the testator and these defendants cannot, in a suit brought by this plaintiff, be compelled to pay over to the estate more than the estate is entitled to. I cannot at the present time determine exactly what shares of stock the estate is entitled to because that depends upon proof of what disposition the executrix has made of the remaining certificates of stock and other assets of the estate.

I will, therefore, direct an interlocutory judgment with costs against the defendant stockbrokers, directing the defendant stockbrokers to account for the shares of stock in the H. K. Porter Company which belong to the estate of Frank H. Bailie, deceased, and that a referee be appointed to take such account and

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determine what portion of the stock certificate delivered to the stockbrokers belonged to the estate and what portion belonged to the executrix individually and will further direct that the stockbrokers deliver to the executrix those shares of stock which belong to the estate. It is fair to point out that such relief is not in any way in conflict with the decision heretofore rendered in this case by another justice that the stockbrokers cannot interpose as a counterclaim any claim which they may have against Edith B. Bailie as an individual. Their right to retain such portion of the stock as belonged to Edith B. Bailie and was delivered to them by her can be determined only in an action between themselves and the said Edith B. Bailie, but in the suit brought by this plaintiff the defendants cannot be compelled to deliver to the executrix any portion of the stock delivered to them which does not belong to the estate and in which this plaintiff has no possible interest. Since the plaintiff has not submitted any findings or conclusions of law I will give all parties ten days to submit such findings and conclusions as they may desire.

Judgment accordingly.

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THE PEOPLE ex rel. GEORGE R. SHELDON et al., Relators, v. THE BOARD OF APPEALS OF THE CITY OF NEW YORK, Constituted under Chapter XIV-A of The Greater New York Charter, as Amended, and JOHN P. LEO, JOHN J. BEATTY, ALFRED J. BOULTON, WILLIAM CRAWFORD, JOHN DE HART, JAMES KEARNEY, and Fire Chief JOHN KENLON, the Members Thereof, Impleaded with WILLIAM WALDORF ASTOR, Respondents, THE FARMERS' LOAN AND TRUST COMPANY, as Executors, etc., Intervenor, Respondent.

(Supreme Court, New York Special Term, May, 1921.)

Certiorari — when writ of, sustained — statutes — zoning regulation, city of New York — board of appeals.

The power to fix zones and create business and residence districts in the city of New York resides wholly in the board of estimate and apportionment except in so far as that body, under the statute (Laws of 1917, chap. 601, amending Laws of 1916, chap. 503, § 242(a)), may have delegated to the board of appeals the right to vary the application of the use district regulation adopted by the board of estimate and apportionment.

No zoning regulation adopted by the board of estimate and apportionment may in effect be repealed or set at naught by the action of the board of appeals taken in the guise of a variance.

The residential character of the properties on the east side of Madison avenue between Thirty-fifth and Thirty-sixth streets in the city of New York cannot but be appreciably lessened in desirability for residential purposes by the construction of a business building opposite them on the west side, and, the board of estimate and apportionment having placed such properties in a district restricted to residence use, the board of appeals, in granting a permit for the erection of a business building on the west side of said block under a resolution containing certain restrictions as to heighth, shape and architectural features, exceeds its power and a writ of certiorari to review such determination will be sustained.

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CERTIORARI proceedings.

Carter, Ledyard & Milburn (Edmund L. Baylies and Edwin De T. Bechtel, of counsel), for relators.

John P. O'Brien (William T. Kennedy, of counsel), for Board of Appeals.

Cadwalader, Wickersham & Taft (Henry W. Taft, of counsel), for Farmers' Loan and Trust Company.

MULLAN, J. Certiorari, to review a determination of the board of appeals permitting the erection, partly in a business zone, and partly in a residence zone, of a proposed building of a business character. The power to fix the zones, and create the several use districts, resides wholly in the board of estimate and apportionment, except in so far as that body may, under the statute (Laws of 1917, chap. 601, amending § 242-a of chap. 503, Laws of 1916) have delegated to the board of appeals the right to vary the application of the use district regulations adopted by the board of estimate and apportionment. The board of estimate and apportionment placed the property on the easterly side of Madison avenue, between Thirty-fifth and Thirty-sixth streets, in a district restricted to residence use. It placed in the same use district the property on the westerly side of Madison avenue, between Thirty-fifth and Thirty-sixth streets, and running westwardly to a point 100 feet west of the westerly line of Madison avenue. It placed in a business use district the property adjoining, on the west, the last-mentioned property and running westwardly to a point beyond the westerly line of the property owned by Astor. Astor's plot is bounded on the east by the westerly line of Madison avenue, on the south by Thirty-fifth street, on the north by Thirty-sixth

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street, and on the west by lines parallel with Madison avenue and 245 feet (at Thirty-fifth street) and 220 feet (at Thirty-sixth street) westerly from the westerly line of Madison avenue. He applied to the superintendent of buildings for permission to erect a business building covering that entire plot so owned by him. Upon denial, he appealed to the board of appeals, and that board made an order granting him the right he sought, its resolution containing certain restrictions as to height, shape and architectural features of the proposed building. The sole question before me is whether the board of appeals, in allowing that invasion of a residence district by a business use, exceeded the powers delegated to it by the board of estimate and apportionment. If it did exceed its powers, its order is not sustainable. If it acted within its powers, its action cannot be questioned. It is wholly a question of jurisdiction. The original source of the variance powers possessed by the board of appeals is the statute of 1917, referred to. That statute provided that the "regulations of the board of estimate and apportionment may provide that the board of appeals may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained." Acting thereunder, the board of estimate and apportionment, in 1917, by an amendment to its zoning resolution of 1916, provided that the board of appeals "may, in appropriate cases, after public notice and hearing, and subject to appropriate conditions and safeguards, determine and vary the application of the use district regulations herein established in harmony with their general purpose and intent, as follows;" and then follow eight lettered clauses or subdivisions, the only one of which that is in point here being subdivision "c." That provision,

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concededly controlling the decision here, reads in full: "Permit the extension of an existing or proposed building into a more restricted district under such conditions as will safeguard the character of the more restricted district." The relators are the owners of the residence properties situate on the east side of Madison avenue, opposite the Madison avenue side of the proposed business building in question, and numerous other owners of residence properties in the same residence use district. It is their contention that what the board of appeals has construed as a variance is, in fact, an amendment or substitution; and their argument seems to me to be unanswerable. For reasons that may have been good or bad, but, in any case, with which a court may not concern itself, the board of estimate and apportionment placed the Madison avenue front at the point in question in a residence zone. Concededly, of course, as between a residence zone, and a zone of the least objectionable business use, the former is the "more restricted." The plain intent and purpose both of the legislature and the board of estimate and apportionment, seems to me to have been merely to permit of the *amelioration* of the rigors of necessarily general zoning regulations by eliminating the necessity for a slavish adherence to the precise letter of a regulation where, in a given case, little or no good on the one side, and undue hardship on the other, would result from a literal enforcement. It would be difficult, as well as unprofitable, to lay down any precise limits to the powers conferred under subdivision "c." But it is quite safe to say that no zoning regulation adopted by the board of estimate and apportionment may in effect be repealed or set at naught by the board of appeals by action taken in the guise of a variance. Was this, then, a variance? We are dealing with a subject that requires

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no special knowledge. Every one must know that the residential character of the properties on the east side of Madison avenue cannot but be appreciably lessened in desirability for residential purposes by the construction of a business building opposite them, on the west side. And so, too, though in lesser degree, must all the residential properties in that residential use district be unfavorably affected by the conversion of the west side of Madison avenue from a residence to a business district. Indeed, it appears to me to be so plain that the so-called variance is not a variance at all, but an amendment that only the board of estimate and apportionment itself has the power to make, as to make it unnecessary to state reasons that must suggest themselves to any one who gives the matter the slightest thought. I shall not refer in detail to the restricting conditions imposed by the board of appeals in respect of the size and other features of the proposed building; but shall let it suffice to say that in my opinion those restrictions, and probably any conceivable restrictions as to a building devoted to a mercantile business use, are wholly inadequate to preserve and safeguard the character of the residence use district as it was created by the board of estimate and apportionment. I hold that the change permitted by the board of appeals is fundamental in character, that it goes beyond the limit of that board's power, and that the board was, therefore, without jurisdiction. The writ is sustained.

Writ sustained.

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THE PEOPLE ex rel. EDWARD SWANN, District Attorney, Relator, v. THE COURT OF GENERAL SESSIONS, etc., Respondent.

(Supreme Court, New York Special Term, May, 1921.)

Criminal procedure — Supreme Court may by ex parte order remove for trial an indictment found in another court — court in which indictment was found has no further jurisdiction in the matter.

The Supreme Court by an order made *ex parte* may remove to that court for trial an indictment found in the Court of General Sessions of the city and county of New York and an application for a writ of prohibition to restrain further proceedings in the court in which the indictment was found will be granted.

If the defendants believe that they are prejudiced by such removal of the indictment, by an order instead of a writ of certiorari, they may move to have the order vacated, but while the order stands the Court of General Sessions has no further jurisdiction in the matter.

APPLICATION for a writ of prohibition.

Edward Swann, district attorney (Robert S. Johnstone and Ferdinand Pecora, assistant district attorneys, Ferdinand Q. Morton, deputy assistant district attorney), for relator.

Otto A. Rosalsky, judge of Court of General Sessions.

John F. McIntyre, for Court of General Sessions.

John B. Stanchfield, for defendant James A. Wendell.

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Max D. Steuer, for defendant Eugene M. Travis.

Walter R. Herrick (Seigfried F. Hartman and Roswell P. C. May, of counsel), for defendant Albert L. Judson.

TIERNEY, J. Indictments were found against Eugene M. Travis and others in the Court of General Sessions of the city and county of New York. On application of the district attorney an order was made *ex parte* at an Extraordinary Term of the Supreme Court, removing the indictment into the Supreme Court. An application is now made for a writ of prohibition to restrain the Court of General Sessions and a judge thereof and the indicted parties from further proceeding in that court. The question presented is whether the Supreme Court had authority to make the order of removal.

There is no express statutory authority for exercising such a right. If it exists it is by force of the common law solely.

The Court of King's Bench in England from ancient times exercised the right of removing into that court from courts of inferior jurisdiction cases of both civil and criminal character. The Supreme Court of the colony of New York had a like power. In the statutes that have been adopted by the state of New York from earliest times, there has been no express repeal of this right nor has there been any express recognition of its existence. Laws have been passed abolishing the right of defendants to secure removals of their cases into the Supreme Court and giving and regulating such right and giving the right to other courts to send their cases into the Supreme Court for trial and the right to the Supreme Court to send cases pending therein to other courts for trial but of the

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right of the Supreme Court to remove a criminal case by its own order and on its own motion from another court, the statutes have been uniformly silent.

But the right did exist outside of any statutory provision as part of the common law jurisdiction of the Supreme Court. That was determined by the Court of Appeals as late as 1879 in the case of *Jones* v. *People*, 79 N. Y. 45.

The possession of this right did not involve any matter of jurisdiction to try an issue but related only to the exercise of the prerogative that had belonged to the crown to regulate the procedure by which an issue should be brought to trial. It was subject, therefore, to legislative control and could be changed or abolished by statute without impinging upon any inherent common law jurisdiction ensured to the Supreme Court by the Constitution. In the case of *Jones* v. *People, supra,* it was said: "The Legislature has full power over the subject, and perhaps it should be exercised as it has been, in respect to the writ, when applied for by a defendant." P. 50.

Accepting the determination of the Court of Appeals that this right of removal was still existent as late as 1879, the question for examination is whether it was abrogated by the adoption of the Code of Criminal Procedure in 1880.

This was intended to furnish a complete and comprehensive system governing all criminal proceedings in all the courts, to supersede all former practice by its regulations. The subject of transfer of cases from one court to another is dealt with in various provisions. The other courts are given the right to send their cases into the Supreme Court and the Supreme Court is given the right to send its cases into the other courts for trial. A defendant may have his case for sufficient reason removed by an order of the Supreme

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Court into that court from another court. Except in such an instance, no right is given or referred to, of a court removing a case by its own order from another court into itself. In the enumeration and definition of the jurisdiction of the Supreme Court in criminal matters is mentioned that to try an indictment "which has been removed from any court into the Supreme Court." It is urged that this is a recognition of a right in the Supreme Court to remove a case from another court existing outside of the Code provisions. That might be its effect if there were no provision in the Code for removal of cases into the Supreme Court from other courts to which it could refer; but as already alluded to, the Code contains express provisions for the procedure for removing cases on the defendant's motion into the Supreme Court by its own order to which the reference may well apply.

There is nothing in the Code of Criminal Procedure that expressly abrogates the right of the Supreme Court to remove an indictment from another court into itself by its *ex parte* action, a right that was in existence at the time of the adoption of the Code. All that can be claimed is the inference that such was the intention from the fact that the legislature purported to enact a comprehensive measure on the subject and failed to include any reference to the existence of such a right. This argument is weakened somewhat by the fact that this statute was a codification of existing laws and that most of its provisions had already existed in similar form in separate statutes and that the existence of these statutory provisions had not militated against the existence of the common law right of removal by the Supreme Court. And there is the further consideration that no provision of the Code of Crimial Procedure is necessarily inconsistent

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with or in antagonism to the existence of the common law right of removal in the Supreme Court.

I appreciate that it is a seeming anachronism that a right based merely on common law practice with no statutory method for its exercise should persist forty years after the legislature attempted to reduce criminal procedure to a statutory system.

I think that it is clear, however, that such a right or power vested in the court cannot be abrogated by inference but only by a repeal clearly and definitely indicated as intended. That has not been accomplished as to the right of removal by the Code of Criminal Procedure as it was not by the various statutes of which that act is a codification.

Objection is further made that the common law right was exercised by a writ of certiorari and no right ever existed to accomplish this by an order as was done in this case; that the right held by the court in *Jones* v. *People, supra,* to be still existent was that to remove an indictment by writ of certiorari. The writ of certiorari was customarily issued *ex parte* without notice to the defendant. *Jones* v. *People, supra,* at page 51. The difference is, therefore, only in the form of the mandate of the court and not in its substance. The tendency of practice is to substitute the simpler form of order for the more elaborate form of mandate of ancient practice. The employment of the writ of certiorari was based on usage and not on any statutory requirement. The order of removal may have been irregular in form but that does not make the action of the court a nullity nor can it be disregarded as inoperative. If the defendants believe that they are prejudiced by having this indictment removed into the Supreme Court by an order instead of a writ of certiorari they may move to have the order vacated. While the order stands, the indictment is removed into

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the Supreme Court and the case is pending there and the Court of General Sessions has no further jurisdiction in the matter.

The application for a writ of prohibition is, therefore, granted.

Application granted.

GEORGE MASSET, Plaintiff, *v.* CLARA RUH, Defendant.

(Supreme Court, Kings Special Term, May, 1921.)

Landlord and tenant — option to purchase premises must be exercised during term of original lease and not of renewal lease — specific performance not decreed where option exercised during renewal term.

There is a clear distinction between a renewal of a lease on the same or similar terms and conditions as are contained therein, and a new lease containing like agreements and covenants.

By a three years' lease the tenant was given an option for a renewal for a like term upon "the same terms and conditions" and also an option to purchase the leased premises and those adjoining "at any time during the term and existence of lease." The tenant during the renewal term, but not before, gave the notice provided for by the lease, of his election to exercise the option of purchase and tendered the purchase price, which was refused. *Held*, that the tenant not having within the term of the original lease exercised the right to purchase which was an independent covenant collateral to the demise, though contained in it, the landlords were entitled to judgment in an action to compel specific performance of the option.

ACTION for specific performance.

Charles Pearl, for plaintiff.

Nicholas Dietz, for defendant.

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BENEDICT, J. This is an action for specific performance. Defendant and her husband, now deceased, being owners of premises Nos. 291 and 295 Ridgewood avenue, Brooklyn, made a lease of premises numbered 295 Ridgewood avenue to plaintiff to be used for garage purposes for the term of three years from August 15, 1916, at a rental of $540 a year. This lease contained an option for a renewal in the following words: "Option for renewal for 3 years from expiration of lease on the same terms and conditions." It also contained a clause as follows: "The Parties of 1st part gives the party of 2d part the right and option to purchase the premises Nos. 291 and 295 Ridgewood Ave. for the sum of $10,000 at any time during the term and existence of lease." The lessee did not exercise the option to purchase during the original term, but did exercise the option to renew the lease, and now, during the renewal term, he has given notice of his election to exercise the option to purchase the demised premises and the adjoining premises No. 291 Ridgewood avenue. He has tendered the purchase money to the defendant, who has refused to grant the fee of the property, claiming that the option to purchase could be exercised only during the original term of the lease. Hence plaintiff seeks to compel, through an action for specific performance, a conveyance of the property. When the original lease expired on August 15, 1916, the plaintiff continued in possession of the demised premises, after having given notice of his election to renew the lease, and has continued in possession down to the present time, paying rent as originally reserved.

The plaintiff contends that the renewal of the lease extended the period of the option to purchase the premises, and he relies principally upon the case of *Pflum* v. *Spencer*, 123 App. Div. 742. He claims that

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this case involved the "exact question" which is here presented, but I find myself unable to agree with him in this regard. In the *Pflum* case the option of renewal read as follows: "And it is further agreed by the party of the first part that she will grant a further lease of the aforesaid premises for a term of one year commencing at the expiration of the term herein granted at the same yearly rental and containing like agreements and covenants as in these presents contained conditioned upon the party of the second part giving to the party of the first part sixty days' notice in writing of her desire or her intention to avail herself of said option of renewal." The distinction between that option and the one in the present case rests upon the words "*and containing like agreements and covenants as in these presents contained.*" In the present case, as has been noted, the clause read: "Option for renewal for 3 years from expiration of lease *on same terms and conditions.*" There is a clear distinction, it seems to me, between a renewal on the same or similar terms and conditions as are contained in a lease and a new lease containing like agreements and covenants. The right to purchase the demised premises and the adjoining premises was not a term or condition of the demise. It was an independent covenant collateral to the demise and contained in it. It was what Chancellor Kent described as an "accidental covenant" and not an essential part of the lease. See *Rutgers* v. *Hunter*, 6 Johns. Ch. 215. I am therefore constrained to hold in the present case that the plaintiff, not having exercised the option to purchase within the term of the original lease, is not entitled to equitable relief of the nature sought in this action.

Judgment for defendant accordingly, with costs.

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JAMES TIEDEMANN, Plaintiff, *v.* MARIA TIEDEMANN, WILLIAM FISHER and RUTH C. FISHER, his wife, Defendants.

(Supreme Court, Queens Special Term for Trials, May, 1921.)

Contracts — oral agreement to reconvey real property upheld — husband and wife — fraudulent conveyances — Statute of Frauds.

At the time when plaintiff, a truckman, had an accident on a railroad a boy riding with him was killed. In an action against the railroad company on his cause of action plaintiff recovered judgment and in fear of an action against him by the parents of the boy, he gave his wife a deed of conveyance of the premises where the family lived, upon her oral agreement to reconvey the property to him at any time. Thereafter he improved the premises and built a stable, paid all the taxes and insurance, besides paying off a mortgage on the property. Subsequently the wife, having left her husband, who is still in possession, without consultation with him, conveyed the property to a neighbor and received and retained the consideration paid. In an action to compel a reconveyance of the premises and for cancellation of the purchase money bond and mortgage made by the alleged innocent purchaser to plaintiff's wife, she testified that she did not remember the conversation which resulted in her oral agreement to reconvey. *Held,* that the plaintiff's version, upon which the court must rely, clearly upheld the contention of the plaintiff as to the oral agreement to reconvey.

The alleged innocent purchaser, who knew both plaintiff and defendant and who was in the court room at the trial but did not take the stand, held not to be a purchaser in good faith, and that plaintiff was entitled to the relief asked for.

ACTION to compel reconveyance of real property founded upon an oral agreement and for cancellation of purchase money mortgage.

Rawdon W. Kellogg, for plaintiff.

Elmer J. Ashmead, for defendant Maria Tiedemann.

Adolph Herzog, Jr., for defendant William Fisher.

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DIKE, J. The problem here is, does the Statute of Frauds act as an insuperable obstacle to the reconveyance of the premises in question to the plaintiff, and to the cancellation of the purchase money, bond and mortgage made by the alleged innocent purchaser, William Fisher, to Maria Tiedemann, wife of plaintiff?

Plaintiff Tiedemann and defendant Maria Tiedemann are husband and wife. They have two children, one fifteen and the other eleven years of age. Plaintiff is a truckman, working for the city. Several years ago he bought a small house in Queens on plot of two lots, taking title in his own name, and in these premises he lived with his family. The complaint alleges, and the evidence shows, that plaintiff had an accident on the Long Island Railroad in November, 1918. At that time a boy riding with the plaintiff was killed. Plaintiff sued the railroad company and recovered on his cause of action, and, fearing that some action might be started against him by the parents of the boy, the matter was talked over with his wife, and the plaintiff said: "I guess I better sign the house over to you. You can keep it for a home for us. So she says, all right. Now, I said to her, can I have this place back at any time I want it. She says, yes, two or three years — any time you want it back, you can get it back." Plaintiff thereupon deeded the property to the defendant, his wife, for the consideration of $1, and in so doing, denuded himself of all property, save the horses and truck. Since that time, the plaintiff has improved the property, putting water into the house and building a stable on the place big enough to stable four horses, and testimony is that to replace it would cost about $1,200. He has improved the surroundings of the house and added to its value in other ways, and plaintiff alleges that he received an

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offer of $4,000 for the house some time last fall. The plaintiff paid all the taxes and the insurance, also paying off a mortgage of $100. The defendant Maria Tiedemann, with her children, left her husband, who is still in possession, however, and thereafter, on December 5, 1920, meeting the defendant Fisher on a trolley car, spoke to him about the purchase of the property in question. She had known defendant Fisher, a neighbor, about three years. The agreed price for the transfer of the property to Fisher was $2,500. She did not consult her husband, and it does not appear that she consulted anybody else as to the consideration. Fisher agreed at once to purchase it for that price and on the following day, at the office of the attorney for Fisher, a memorandum of a payment of $100 was drawn up and signed, which sum the defendant Maria Tiedemann retained. The deed being delivered the following day at the office of the attorney of defendant Fisher, the defendant Maria Tiedemann received the sum of $900, and a bond and mortgage of $1,500, and retained all of these.

The circumstances here are certainly persuasive in their collective force of a fraud upon the plaintiff, a breach of the oral agreement between husband and wife. Earl, J., in the case of *Wheeler* v. *Reynolds*, 66 N. Y. 227, 236, says: "It is a mistake to suppose that parol agreements relating to lands are any more valid in equity than at law. They are always and everywhere invalid. But courts of equity have general jurisdiction to relieve against frauds, and where a parol agreement relating to lands has been so far partly performed that it would be a fraud upon the party doing the acts, unless the agreement should be performed by the other party, the court will relieve against this fraud and apply the remedy by enforcing the agreement. It is not the parol agreement which lies at the

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foundation of the jurisdiction in such a case, but the fraud. So in reference to parol trusts in lands. They are invalid in equity as well as in law. But in cases of fraud courts of equity will sometimes imply a trust and will treat the perpetrator of the fraud as a trustee, *ex maleficio*, for the purpose of administering a remedy against the fraud."

A uniform series of authorities clearly uphold the rigid rule of the Statute of Frauds but clearly enunciate the rule that the Statute of Frauds cannot be used as an instrument of fraud. In the case of *Wood* v. *Rabe*, 96 N. Y. 414, 425, Danforth, J., says: "There are two principles upon which a court of equity acts in exercising its remedial jurisdiction, which taken together in our opinion entitle the plaintiff to maintain this action. One is that it will not permit the statute of frauds to be used as an instrument of fraud, and the other, that when a person through the influence of a confidential relation acquires title to property, or obtains an advantage which he cannot conscientiously retain, the court, to prevent the abuse of confidence, will grant relief.

"'The statute of frauds,' observes Lord Redesdale in *Bond* v. *Hopkins* (1 S. & L. 433), 'says that no action or suit shall be maintained on an agreement relating to lands which is not in writing, signed by the party to be charged therewith; and yet the court is in the daily habit of relieving where the party seeking the relief has been put into a situation which makes it against conscience in the other party to insist on a want of writing so signed, as a bar to his relief.'"

In *Wheeler* v. *Reynolds*, 66 N. Y. 227, Earl, J., speaking of parol trusts in lands, writes: "They are invalid in equity as well as in law. But in cases of fraud courts of equity will sometimes imply a trust and will treat the perpetrator of the fraud as a trustee, *ex*

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maleficio, for the purpose of administering a remedy against the fraud. For the same purpose it will take the trust which the parties have attempted to create and enforce it; and in such a case the fraud, not the parol agreement gives the jurisdiction."

In the instant case there is no evidence that the plaintiff was endeavoring to defraud his creditors. The complaint would indicate a *fear* of an action, which evidently and obviously was not based upon fact as there has been no action brought against the plaintiff, and therefore all the authorities which so strongly uphold the rights of creditors seeking property of a fraudulent debtor do not apply. The plaintiff was obsessed by a fear and that does not place him, in my judgment, in the category of debtors seeking to avoid their just debts. On the contrary, the plaintiff's motive was a good one — the establishment of a home for his family, with the right, however, if necessary at a later time to have the property reconveyed to him. The case of *Goldsmith* v. *Goldsmith*, 145 N. Y. 313, which involved the trust and confidence arising out of family relations, as in the instant case, decided in this department and sustained by the highest court, reiterates this rule. The influence which the law presumes between husband and wife is that influence which is superinduced by the relations between them and generated in the mind of one by the confidence and trust which he has in the devotion and fidelity of the other. Such influence the law presumes undue whenever that confidence is subsequently violated or abused. The test is the betrayal of the confidence imposed, and some breach of duty owed under it, and one chargeable with a trust of this nature becomes a trustee *ex maleficio*. *Lamb* v. *Lamb*, 18

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App. Div. 250; *Dressel* v. *Hanser*, 101 Misc. Rep. 574; *Trice* v. *Comstock*, 121 Fed. Repr. 620.

The plaintiff relies upon the case of *Gallagher* v. *Gallagher*, 135 App. Div. 457, first department, where the plaintiff conveyed property to his wife for the purpose of qualifying her as surety upon bonds to be given for his benefit under an agreement, and after such bonds were cancelled and the rights of the third party extinguished, she was to deed it back. "This is not a case," said Clark, J., "covered by the Statute of Frauds, but is one of those cases where equity interposes to prevent the perpetration of a fraud or the abuse of confidence." Mr. Justice Ingraham, in *Gallagher* v. *Gallagher*, *supra*, wrote a dissenting opinion, but it was because he found *no element of fraud*. As said by him in his opinion: "It seems to me that these provisions expressly prevent the enforcement of an oral trust in real property or an oral agreement to convey real property, and in the absence of fraud, of which there is neither finding nor proof, the court is powerless to aid the plaintiff."

The facts and circumstances relating to the transfer by plaintiff to his wife, must be looked for in his statement of the conversation prior to the transfer. The defendant, Maria Tiedemann, practically and in effect, does not even deny the conversation. Her testimony upon that most important point was only this: "I really don't remember the conversation." This leaves the plaintiff's version as the one upon which the court must rely, and would clearly uphold the contention of the plaintiff as to the oral agreement to reconvey.

As to the alleged innocent purchaser, defendant Fisher, I am unable to regard him in that light. The evidence seems to me to negative the element of innocence. He knew both plaintiff and defendant; he

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lived a short distance away from them; the circumstances surrounding the sale — so casual, so informal and so utterly lacking in all of the safeguards relative to such a transaction; the inadequacy of the consideration, so much lower than the value of the property, as fixed by plaintiff; the hasty conclusion of the contract of purchase; the plaintiff being in possession, and the defendant Maria Tiedemann and her children not residing on the premises — all these elements force me to the conclusion that he is not a purchaser in good faith. In the case of *Lang* v. *Lang*, 131 N. Y. Supp. 891, an action similar in many respects to this, Jaycox, J., in his opinion, says: "The defendant Mueller stands in no better position than the defendant Lang. He took his deed when the premises were in the open and notorious possession of the plaintiff. This being so, he is charged with a knowledge of the exact rights of the person so in possession."

Later, Mr. Justice Jaycox said: "It must be assumed that he knew that the plaintiff lived upon the premises, and that the defendant Lizzie Lang did not live upon the premises. This would charge him with notice that the plaintiff was in possession, and thereby charge him with knowledge of any right which the person in possession is able to establish."

The defendant Fisher (the purchaser) was in the court room at the time of the trial but did not take the stand.

I have examined the cases relied upon by the defendants William Fisher and Ruth C. Fisher, but I do not feel that they are applicable to this situation; nor can I acquiesce in the argument of the attorney for the defendant Maria Tiedemann, that the plaintiff does not come into court with clean hands. Fraud must be alleged and proved by the party of whom advantage

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has been taken. *Bailey* v. *Ryder*, 10 N. Y. 363; *Gould* v. *Gould*, 51 Hun, 9. This the plaintiff has done.

I therefore hold that the plaintiff should prevail and I decree judgment asked for in the complaint.

Judgment for plaintiff.

PEOPLE ex rel. EMELIE HEINLE, Respondent, *v.* MATTHEW HEINLE, Defendant, Appellant.

(County Court, Bronx County, May, 1921.)

Husband and wife — although a wife is not entitled to an allowance for maintenance pending an action to annul the marriage, the husband is liable for her support until decree of nullity is entered.

In an action to annul a marriage the defendant's wife is not entitled to an allowance for maintenance.

Although a motion for alimony and counsel fee in a wife's action for an annulment of her marriage to defendant has been denied, defendant's motion to vacate an order theretofore made in a proceeding in the Domestic Relations Court directing him to pay her a certain sum per week toward her support is properly denied upon the ground that until the entry of a decree of nullity, the marriage is valid, and the husband must keep his wife from the likelihood of becoming a public charge.

APPEAL from an order of a city magistrate.

Milton Hart, for defendant-appellant.

John P. O'Brien, corporation counsel (John F. O'Brien and Henry J. Shields, of counsel), for respondent.

GIBBS, J. This is an appeal by the defendant-appellant from an order of the city magistrate made in the Domestic Relations Court, borough of The Bronx, denying the application to vacate an order

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directing the defendant to pay his wife the sum of twelve dollars per week.

In September, 1920, the People of the State of New York on behalf of Emelie Heinle, instituted a proceeding in the Domestic Relations Court, to compel her husband to provide for her. On September 27, 1920, an order was entered on consent, directing the defendant to pay to his wife the sum of twelve dollars per week towards her support. Thereafter she instituted an action in the Supreme Court for an annulment of her marriage to the defendant on the ground of his physical incapacity. An application was made by her for alimony and counsel fee, which application was denied. The defendant thereafter made a motion before the City Magistrate to vacate the order entered on September 27, 1920, which motion was denied. From this determination the defendant appeals to this court.

The contention of the appellant is that complainant having instituted an action for annulment of her marriage, she is not entitled to receive support from him.

It is now well settled that where the wife sues for the annulment of her marriage, she is not entitled to an allowance to maintain herself. *Jones* v. *Brinsmade,* 183 N. Y. 258; *Lake* v. *Lake,* 194 id. 179. This is based upon the principle that he who elects to rescind a contract can claim nothing under it. In other words, where the wife denies the existence of a valid marriage she cannot consistently claim that the defendant is under obligation to provide her with means to carry out her suit against him. *Griffin* v. *Griffin,* 47 N. Y. 134. If the wife succeeds in her action the decree of nullity in effect dates back to the date of the marriage. In short, the parties are to be regarded as having never been married.

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But in the case at bar we are confronted with another proposition. If the appellant's contention is sustained, the complainant is likely to become a charge on the public. The corporation counsel for the city of New York, who appears for the respondent, urges that the Domestic Relations Court and the Supreme Court of the state of New York have concurrent jurisdiction in proceedings for the support of a wife and that the denial of alimony in the annulment suit should not affect the ruling of the city magistrate. I believe his contention is correct.

Proceedings for the support of wives and children by their husbands and fathers are provided for in the Code of Criminal Procedure (§ 899 *et seq.*). The purpose of these proceedings is not to adjust domestic relations but to prevent abandoned wives and children from becoming public charges. *People* v. *DeWolf*, 133 App. Div. 879. It is with this in view, that the learned city magistrate denied defendant's application.

It is true that the complainant seeks to avoid the marriage but it is equally true that so far as the people of the state of New York and the city of New York are concerned her marriage to the defendant is legal and binding until a decree nullifying it is entered by a court of competent jurisdiction. She may be unsuccessful in her action or she may discontinue it. The parties may even become reconciled. In either of these contingencies, there can be no question as to defendant's duty to support her. Until there is a final determination declaring the marriage a nullity, so far as third parties are concerned, the marriage is valid and the husband must keep her from becoming a burden on the public.

The order is, therefore, affirmed.

Order affirmed.

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Matter of the Estate of JOSEPH J. RYAN, Deceased.

(Surrogate's Court, New York County, May, 1921.)

Executors and administrators — contested probate — rights of temporary administrator — when discovery proceedings will not cover personal letters.

While prior to the issuance of letters the one named in a will as executor may have certain dominion and custody over the property of a decedent, his rights are subordinate to those of the temporary administrator, in the event of a contested probate.

Discovery proceedings may not be used for the purpose of seeking evidence to be used in another proceeding.

A temporary administrator as an incident of his duty to take into possession the assets of the estate, should, pending a contest of the will, take possession of such documents as bear upon the financial affairs of the deceased, books of account and other similar papers, and in a discovery proceeding an order directing delivery to him of such documents will be granted.

Such an order, however, will not be made to cover letters written by the residuary legatee to the deceased; if they constitute material and competent evidence the Code of Civil Procedure provides ample methods for their production for use upon the trial.

DISCOVERY proceeding.

Charles A. Curtin, temporary administrator.

John J. Robinson, for Dorothy L. Whiteford.

Joseph A. Fagnant, for executor.

Richard H. Clarke, for widow.

Outerbridge Horsey, special guardian.

FOLEY, S. In this discovery proceeding, brought by the temporary administrator, respondent is directed

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to deliver, in addition to the property already turned over, all papers relating to the financial affairs of the deceased, and all other documents, with the exception of letters written by the residuary legatee to the deceased. The former class of papers should properly be in the possession of the temporary administrator, rather than the person named as executor in the will. While the latter appears to have certain dominion and custody over the property of a decedent prior to the issuance of letters (Jessup-Redfield, 563; 2 Williams Exrs. [7th Am. ed.] 116; Toller Exrs. [4th Am. ed.] 153), his rights are subordinate to those of the temporary administrator appointed in the contested probate proceeding.

The nature of discovery proceedings, the functions and duties of a temporary administrator and the property right of the sender in personal letters require that they should remain where they are.

(1) Discovery proceedings can only be brought to obtain the delivery of specific personal property, or to acquire knowledge or information with regard to its possession. They cannot be used for the purpose of seeking evidence to be used in other proceedings. *Matter of Heinze,* 224 N. Y. 1; *Matter of Kingsley,* 111 Misc. Rep. 528; *Matter of Denham,* N. Y. L. J. June 23, 1917; affd., 180 App. Div. 935; *Matter of Appel,* N. Y. L. J. April 2, 1921.

(2) The powers of a temporary administrator are limited by statute and are to be exercised primarily for the preservation of the estate pending the contest. It is his duty to take into possession the assets (Code Civ. Pro., § 2597) to secure and preserve them. Incidentally to aid him in his duties he should take possession of such documents as bear upon the financial affairs of the deceased, books of account and other similar papers. Section 2768 of the Code of Civil

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Procedure, subdivision 3, defines the word "assets" as "personal property applicable to the payment of the debts of a decedent." In *Eyre* v. *Higbie*, 35 Barb. 502, it was held that private letters are not estate assets. The question at issue in that case was whether the plaintiff, who asserted right to the possession of certain letters written by George Washington to his military secretary, Colonel Lear, by an assignment from the latter's administrator, could prevail against the defendant, who had received the letters over forty years before from the widow of Colonel Lear. The opinion of Mullin, J., states in this case at page 507: "It would be a disgrace to the age in which we live, and to the government whose laws we administer, if the letters from a testator's or intestate's wife or child could be made the subject of sale at auction, and the peace of families, the character of individuals, the secrets of governments published to the world, in order that a few pence might be realized in order to pay a debt or legacy. Such things, I trust, cannot be done. In no imaginable contingency can I be induced to give my sanction to such a monstrous doctrine." Nothing can be added to the vigor of that language and the soundness of the reasoning. A sale would be an encouragement to persons not interested in the good name of deceased, or his relations, to purchase correspondence for purposes of publication. The alternative is equally disgraceful, for the family might be compelled to bid large sums to retain possession against persons seeking to purchase them.

(3) The property right of the sender in a letter is well recognized and publication may be prevented by injunction. *Gee* v. *Pritchard*, 2 Swanst. 402; *Abernathy* v. *Hutchinson*, 3 L. J. Ch. 209; *Prince Albert* v. *Strange*, 1 Macn. & G. 25; 2 De G. & S. 652, cited with approval in *Roberson* v. *Rochester Fold-*

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ing Box Co., 171 N. Y. 538; Ingpen Exrs. (2d ed.) 318; *Thomson* v. *Stanhope*, Amb. 737; *Brandreth* v. *Lance*, 8 Paige, 24; *Macmillan & Co.* v. *Dent*, L. R. 1 Ch. Div. (1906) 101; *Philip* v. *Pennell*, L. R. 2 Ch. Div. (1907) 577. The delivery of these letters to the temporary administrator is in substance a publication. Caution requires, in order to prevent any disclosure of their contents, that they remain where they are now under the control of the writer.

Story in his Equity Jurisprudence (Vol. 2 [14th ed.] 625, 627) says: "In a moral view the publication of such letters, * * * is perhaps one of the most odious breaches of private confidence, of social duty, and of honorable feelings, which can well be imagined. It strikes at the root of all that free and mutual interchange of advice, opinions, and sentiments between relatives and friends and correspondents which is so essential to the well-being of society and to the spirit of a liberal courtesy and refinement. It may involve whole families in great distress, from the public display of facts and circumstances which were reposed in the bosoms of others under the deepest and most affecting confidence that they should forever remain inviolable secrets. * * * it by no means follows that private persons have a right to make such publications on other occasions, upon their own notion of taking the administration of justice into their own hands, or for the purpose of vindicating their own conduct, or of gratifying their own enmity, or of indulging a gross and diseased public curiosity by the circulation of private anecdotes or family secrets or personal concerns."

If these letters constitute material and competent evidence, the Code provides ample methods for their production for use upon the trial.

Decreed accordingly.

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Matter of the Estate of BENJAMIN ALTMAN, Deceased.

(Surrogate's Court, New York County, May, 1921.)

Wills — construction of — bequest to employee — when employment need not be continuous to come within terms of the will — evidence — opening of decree settling accounts of executor.

A will is ambiguous only when it is judicially determined that no interpretation can be given to the instrument.

There is no latent ambiguity in a bequest of money to each of such persons who have been in the employ of a certain named corporation "for fifteen years or more and less than eighteen years" upon condition that each of them shall be at the time of the death of the testator in his employ or that of the corporation, and parol evidence is inadmissible to show that it was the intention of the testator to confine his bounty to continuously employed persons, and one who when testator died had been thus employed, during two intervening periods, slightly less than eighteen years, is a legatee under said provision of the will, and entitled to take.

The application of said legatee to open, set aside and vacate decrees entered upon the settlement of the accounts of the executor of the estate, granted on the ground that petitioner not having been cited to attend such accountings, the decrees entered thereon were as to him void.

APPLICATION to set aside and vacate three decrees settling the accounts of executors.

Edwin C. Mulligan, for John R. White.

Cadwalader, Wickersham & Taft, for executors.

FOLEY, S. This is an application by petitioner, claiming to be a legatee, to set aside and vacate three decrees filed in this court March 5, 1915, March 21, 1916, and October 4, 1917, settling the accounts of the

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executors of the estate of Benjamin Altman. The question here is whether the petitioner White is entitled to a legacy of $1,000 under the will, and particularly whether the terms of the will require continuity of service, or whether an interrupted term of service, exceeding fifteen years, entitled him to the amount claimed. Subdivision 3 of paragraph 7 of the will reads as follows:

"* * * I further give and bequeath to each of the persons who shall be in the employ of said corporation B. Altman & Co. at the time of my death, * * * and to each of such persons who have been in such employ for fifteen years or more, and less than eighteen years, other than the persons hereinbefore in this clause mentioned, and other than those who shall otherwise be legatees in some other clause of my will, the sum of one thousand dollars ($1,000) provided, however, that piece-workers shall not be included in these several classes.

"All the money bequests hereinbefore contained in this clause of my will are made, however, in like manner, upon the condition that the legatees, and each of them, shall be at the time of my death in my employ, or in the employ of said corporation B. Altman & Co."

I hold that the petitioner is a legatee under the will. He was employed by B. Altman & Co. from November 6, 1893, to October 7, 1897, and from November 13, 1899, to July 2, 1920, so that on October 7, 1913, when the testator died, he had thus been employed for two periods, four years and fourteen years, or a total service of slightly less than eighteen years.

The executors claim that there is a latent ambiguity arising *dehors* the will and that parol evidence is admissible to establish that the intention of the testator was to confine his bounty to *continuously*

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employed persons. I find no such ambiguity. The language of the will is clear. A will is ambiguous only when, after full consideration, it is determined judicially that no interpretation can be given to it. Beal, Rules of Interp. 580. "Extraneous and parol evidence is admissible to explain a will where there is a latent ambiguity arising *dehors* the instrument, but never to supply, contradict, enlarge or vary the written words." *Brown* v. *Quintard,* 177 N. Y. 75, 83, quoting from *Mann* v. *Mann,* 1 Johns. Ch. 231; *Fries* v. *Osborn,* 190 N. Y. 35; *Matter of Lummis,* 101 Misc. Rep. 258; *Matter of Douglas,* 97 id. 208; Jessup-Redfield, 551. The controlling factor is the intention of the testator, and that intention must be gathered from the language of the will. *La Frinz* v. *Whitney,* 195 App. Div. 131; *Fulton Trust Co.* v. *Phillips,* 218 N. Y. 573; *Cammann* v. *Bailey,* 210 id. 19; *Herzog* v. *Title Guarantee & Trust Co.,* 177 id. 86; *Ritch* v. *Hawxhurst,* 114 id. 512. Mr. Altman's intent cannot be enlarged or explained by his declarations, memoranda or other evidence. *Reynolds* v. *Reynolds,* 224 N. Y. 429. Here under one exception to the general rule, the *identity* of the persons who answer to the conditions imposed by the testator may be shown by extrinsic evidence. But the circumstances of the employment of petitioner are conceded. The whole scheme of the will was to benefit the faithful employees of B. Altman & Co. either by direct legacies or through the Altman Foundation. His intention was to reward those who aided him in the building up of his business. The legacy claimed by White was not restricted by the terms of the will to those whose employment was for successive years. In the first provision of paragraph Seventh he rewarded "long continued service" by giving more substantial legacies of stock in B. Altman & Company to persons

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specifically named. In the second provision of that paragraph he refers to the legatees, also specifically named, as those rewarded for "long and faithful service." On the other hand, no such characterization as "longed continued" or even "long and faithful" was used in the third provision of that paragraph. The word "period" is not mentioned in the particular clause involved here. If he had intended to exclude those whose service had been interrupted, the will could have been phrased so as to express that intention. But such a condition cannot be read into the will.

A previous construction by Mr. Surrogate Fowler held that piece-workers were not entitled to share, where part of their term of service was rendered in that capacity and part as salaried employees. *Matter of Altman,* 89 Misc. Rep. 697; affd., 171 App. Div. 903; affd., 217 N. Y. 680. This decision is not, however, applicable here for the testator expressly provided "that piece-workers shall not be included in these several classes." This exception shows the care taken by testator in defining the objects of his bounty, and makes significant the failure to use the word "continuous." We are not dealing here with a requisite period of service of but a few years. The testator fixed a comparatively long period of time with a minimum of fifteen years. Satisfactory service is not turned into an "in and out" employment by but one interruption. The re-employment of a person usually implies satisfaction with his services, and in this case was justified by White's subsequent loyalty. Circumstances in other cases, where the requisite period of service was short, for example, one or two years, might require that a delinquent employee or malingerer should be denied the bounty of an employer.

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In *Matter of Becker*, 39 Misc. Rep. 756, the language was even stronger than here and the words used, "period of not less than two years," were construed to mean the total length of service, and not unbroken service. In *Matter of Cowell*, 167 Cal. 222, similar language was held not to require continuous employment of the legatee. In that case *Matter of Klein*, 35 Mont. 185, cited by the executors, was distinguished. The testator in using the words "*in such employ for fifteen years or more*," therefore, must be deemed to have referred to the aggregate of employment only. It was the executors who gave the will a different interpretation. They attempted to prescribe those entitled to legacies. The nature of the employment and the length of service of the employees of B. Altman & Co. were peculiarly within their knowledge. If they were in doubt, they could have cited the employees concerned, and the question could then have been passed upon by the surrogate. They proceeded on their own judgment of the intent and effect of this clause, and in my opinion they did so erroneously. The gracious generosity of Mr. Altman would be considerably diminished if the tests sought to be applied by counsel for the executors were accepted by the court. It is admitted that White was employed for seventeen years, and as the will made the bequest to each person employed for over fifteen years, he is entitled to the legacy.

Every decree of a Surrogate's Court is conclusive as to all matters embraced therein against every person of whom jurisdiction was obtained. Code Civ. Pro. § 2550. A similar provision (Code Civ. Pro. § 2742) applies particularly to decrees on accounting. The petitioner being a party in interest, and not having been cited, the decrees as to him are

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void. Such decrees may be opened on application of a party interested who had no notice of the accountings. *Matter of Killan,* 172 N. Y. 547; *Wells* v. *Wallace,* 2 Redf. 58; *Matter of Gall,* 182 N. Y. 270. The lapse of many years does not prevent the surrogate from opening, vacating, or setting aside such decrees. *Matter of Regan,* 167 N. Y. 338; *Matter of Flynn,* 136 id. 287; *Matter of Mather,* 41 Misc. Rep. 414; affd., 90 App. Div. 382; *Matter of Henderson,* 157 N. Y. 423; *Matter of Johnston,* 76 Misc. Rep. 374; *Matter of Dalton,* N. Y. L. J., Dec. 3, 1908.

The executors claim further that the petitioner is guilty of laches in making this application. Even if the principle of laches applied, I would, upon the facts, in my discretion, overrule this contention.

Motion to open and vacate decrees on accounting (as to petitioner only) is granted.

Decreed accordingly.

Matter of the Petition of SUSAN M. MEAD to Obtain a Determination as to the Validity, Construction or Effect of a Disposition of Property Contained in the Last Will and Testament of WILLIAM C. MEAD, Deceased.

(Surrogate's Court, Saratoga County, May, 1921.)

Wills (holographic) — construction of — when bequest will not be cut down by a subsequent repugnant clause — annuities — when devise held to be in fee simple absolute — Real Property Law, § 153.

Testator by a will drawn by himself gave to his father and mother one-third in value of all the property of which he should die seized, any or all to be used or expended by them or the survivor of them as they should see fit, and in the event that both survived testator, so much of the property as should remain at the death of both his father and mother was

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devised and bequeathed to testator's wife. The rest, residue and remainder of the estate was given to testator's wife to use as she saw fit, and so much thereof as remained at her death was devised and bequeathed to testator's daughter and by a subsequent clause an annuity of $150 was directed to be paid to her until her marriage. *Held*, that under section 153 of the Real Property Law, which must govern, the devises of the real estate were in fee simple absolute.

The absolute estate in the personalty given to testator's father and mother was not cut down by the subsequent repugnant clause following such gift, and similar considerations apply to the gift of the remainder of the estate to testator's wife.

Placing the clause relating to the annuity before that of the gift to the wife of the remainder, substantial effect is given to the desire of the testator which was that his parents should receive one-third of the entire estate, that out of the balance the annuity should be provided and that his wife should receive the remaining balance.

PETITION for the construction of a will.

Brackett, Todd, Wheat & Wait, for petitioner.

H. E. McKnight, for Charles N. Mead and Anna M. Mead.

OSTRANDER, S. This is a petition for the construction of the will of deceased.

The will provides as follows:

"*First.* After my lawful debts are paid, I give, devise and bequeath to my father, Charles N. Mead and my mother, Mrs. Anna M. Mead * * * one third in value of all the property whereof I may die seized. Any or all of such property shall be used or expended by them or by the survivor of them as they shall see fit * * *. If both of them shall survive me, then so much of the said property as shall remain at the death of both of them I give, devise and bequeath to my wife, Susan M. Mead.

"*Second.* I give, devise and bequeath to my wife, Susan M. Mead, all the rest, residue and remainder

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of my property whereof I may die seized to use and expend as she shall see fit * * *. At her death or remarriage, I give, devise and bequeath to my daughter, Mary Marshall Mead, so much of said property as shall remain.

"*Third.* I direct that the sum of One hundred fifty Dollars ($150.) to be paid to my daughter Mary Marshall Mead, each year until her marriage * * *.

"I hereby appoint my said wife, Susan M. Mead to be executrix of this my last Will and Testament."

So far as the will relates to real estate, section 153 of the Real Property Law, which provides that every power of disposition by means of which the grantee is enabled in his lifetime to dispose of the entire fee for his own benefit is deemed absolute, must govern in this case.

So far as personalty is involved in the will, there is no express limitation upon the power of Charles N. Mead and Anna M. Mead to use one-third of the property bequeathed to them as they shall see fit.

They have ample power to dispose of one-third of the estate as they see fit.

If the will stopped there, an absolute devise and bequest is made of both realty and personalty.

Is this estate cut down by the subsequent provision in the same paragraph that if both parents survive him, and any of the property remain at the death of both, testator gives, devises and bequeaths such remainder to his wife?

It is a well settled rule of construction that when an interest is given or an estate conveyed in one clause of an instrument, it cannot be cut down or taken away by raising a doubt from other clauses, but only by express words or by clear and undoubted implication (*Freeman* v. *Coit,* 96 N. Y. 63); or as said by Judge O'Brien in *Goodwin* v. *Coddington,* 154

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N. Y. 283, 286: "Whenever the will begins with an absolute gift, in order to cut it down, the latter part of the will must show as clear an intention in that direction as the prior part does to make it."

To the same effect are *Clarke* v. *Leupp*, 88 N. Y. 228; *Roseboom* v. *Roseboom*, 81 id. 356, and numerous other cases.

In the present case, the final clause of the paragraph does not attempt to limit the power of the father and mother to use or expend the whole estate, but rather, by repetition emphasizes that power.

It is idle for the court to direct that any part of the property shall be kept for the widow after the death of the testator, in the face of the power of dominion over it, given by the earlier sentences of the paragraph.

If any effect can be given to this latter clause, it can be effective only as to such portion as the father and mother may choose to leave unexpended. This does not cut down the absolute estate given by the prior clauses. It is equivalent to saying I give this property to A absolutely but if he does not use it all, I give the rest to B. The gift of absolute dominion and the attempt thereafter to limit the incidents of this dominion by attempting to bequeath again what has already been given to and vested in another amount to repugnancy.

Similar considerations apply to the gift to Susan M. Mead, widow, by the 2d clause of the will.

The direction of the 3d clause is that an annuity be paid to his daughter until her marriage. There is no express trust created by this clause, no trust fund created, no trustee designated. In fact if the exact order of the language of the will be followed, there is nothing left undisposed from which to make such payment.

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But it is a cardinal rule of construction that the real intent of the testator, if it can be discovered from the whole instrument, must be given effect.

The testator evidently drew his own will and was not skilled in the art. It is fairly plain that he intended to provide for his aged parents and for his daughter until her marriage, and to make his wife residuary legatee and devisee. His desire seems to have been to give to his parents one-third, *in value,* of *all* his estate; to his daughter an annuity of $150 until she married, and to his wife, the residuary.

It will be noted that he does not, in terms, give to his wife *two-thirds,* as he gave to his parents *one-third,* in value of his whole estate, but only the residuum.

If the order of the provisions be transposed, so as to place the third before the second, substantial effect will be given to all his desires.

This leads to the construction that his parents receive one-third of the whole estate, that out of the balance the annuity to his daughter be provided, and that his wife receive the balance.

Decreed accordingly.

JASH-LAP REALTY CO., INC., Plaintiff, *v.* HARRY FISHMAN et al., Tenants of No. 1018 East One Hundred and Sixty-third Street, New York City, Defendants.

(Municipal Court of the City of New York, Borough of The Bronx, First District, May, 1921.)

Landlord and tenant — method of determining reasonable rent in the city of New York — burden of proof — deductions — Laws of 1920, chap. 944.

While the price or value of a building and its rental value stand in a certain necessary relation to each other, the ratio between the rent of land and the price thereof varies widely.

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In twenty-two actions to recover $125,000 rent for apartments in a building used for dwelling purposes in the city of New York under leases made between April 1, 1920, and September 27, 1920, when chapter 944 of the laws of that year went into effect, and which leases contained no provision making an adjoining playground appurtenant to the demised premises, the defense interposed was that the rent was unjust and unreasonable and that the agreements under which recoveries were sought were oppressive. It appeared on the trial that in 1918 the landlord paid $575,000 for the premises and in addition claimed a liability of $75,000 under an option given to its grantor to purchase back the premises upon payment of that amount. Although the plaintiff claimed that the property is worth $750,000, the cost of reproduction, it further appeared that the gross income of the property amounts to $103,000. The verdict of the jury in favor of defendants was based upon the sum of $688,000, the assessed valuation of the property for the year 1920–1921, but that valuation included vacant adjoining premises assessed for 1921 at $88,000, which, under a former owner, was laid out as a playground and used exclusively by the tenants, but since acquired by plaintiff, has been shut off. Upon denying a motion to set aside the verdicts as contrary to law and the evidence, and upon all the grounds specified in section 999 of the Code of Civil Procedure and section 129 of the Municipal Court Code and for a new trial, *held:*

That the jury had a right to consider that the playground was not a part of the demised premises, thus reducing the value, as assessed, to $600,000, somewhat over six times its rental value.

That the burden was upon plaintiff to reasonably satisfy the jury that it was entitled to allowances for depreciation, repairs, collection, etc., but that the jury were not bound to allow all deductions claimed.

MOTION for a new trial.

Anthony J. Romagna, for plaintiff.

Adlerman & Adlerman, for defendants.

ROBITZEK, J. In this case the jury rendered a verdict in favor of the defendants. A motion was there-

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upon made to set aside the verdict as contrary to the law, contrary to the evidence, and upon all of the grounds specified in section 999 of the Code of Civil Procedure and section 129 of the Municipal Court Code. The facts briefly stated are as follows:

The plaintiff, landlord, herein has brought twenty-two actions to recover the rents for the month of October, 1920, from the tenants under written leases for apartments in premises commonly known as "The Hunts Point," the largest six-story apartment house in the world, located at the junction of Simpson street, One Hundred and Sixty-third street and Southern boulevard in the borough of The Bronx, city of New York, the leases having been signed by the several tenants after April 1, 1920, and before chapter 944 of the Laws of 1920 took effect. The tenants interposed a defense that the rent was unjust and unreasonable and that the agreements under which the same are sought to be recovered are oppressive.

The landlord paid for these premises in 1918 $575,000, and claimed a liability in addition thereto of $75,000 created by an option given to the sellers, the Henry Morganthau Company, whereby the sellers could purchase back the premises by paying this amount to the plaintiff. The assessed valuation placed upon these premises for the year 1920-1921 was $688,000, but the plaintiff claims that the real value of these premises is $750,000, which it contends is the cost of reproduction. The only question before the court on this motion is whether or not there was sufficient evidence for the jury to establish the value claimed by the plaintiff. Judge Lehman in the Appellate Term in *Schwartz* v. *Deutsch*, N. Y. L. J., April 21, 1921, held that "It is impossible to fix any definite standard by which the reasonable value of premises are to be determined which would be

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applicable to all cases. * * * The legislature evidently intended that the return upon the investment of the owner of the apartment, or at least upon the value of the premises, should be a material factor in determining what amount will constitute a reasonable rental."

The price or value of a building and its rental value stand in a certain necessary relation to each other. But, while the relation between the two is a necessary one, being no less direct than that of cause and effect, the ratio between the rent of land and the price of land varies widely. In some countries, where the amount of accumulated capital is large; where a high degree of civil security exists; where the rights of property are respected, and where ownership carries with it social distinction and perhaps political influence, the price may be twenty, twenty-five or even thirty times the annual rental. In this city from the failure of one or all of the conditions a building sells for about six times its rental, but while between the purchase price and the cost of reproduction, it is the latter and not the former which determines its value; it is not true that value is always determined by the cost of reproduction, it may be in regard to any given building at any given time, that the cost of reproducing it would be greater, even far greater than the price at which it sells, and as the cost of reproduction cannot determine the price of this building, the only principle of universal application upon which its value can rest, is that of demand and supply based upon the market price, and as there has been no sale of these premises since 1918, in order to measure the final utility of the building, I must assume that the jury based their verdict upon the assessed valuation.

But this price includes vacant adjoining premises

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assessed by the city for 1921 at $88,000, which was laid out as a play-ground and which under the former owner was exclusively used by the tenants, but since acquired by the plaintiff, has been shut off. The leases do not contain a provision making the play-ground appurtenant to the premises demised, and the jury had a right to consider that this play-ground was not a part of the premises leased, thus reducing the value, as assessed, to $600,000.

The testimony shows the gross income from the property amounts to $103,000, and about six times this annual rental would be over $600,000, the assessed value.

The jury were not bound to allow the landlord all the deductions it claimed; the burden being upon the plaintiff to reasonably satisfy the jury from the evidence that it was entitled to allowances such as depreciation, repairs, collection, etc. The rents demanded by the plaintiff, if received, would have given this landlord $125,000, and six times this annual rental would establish a price for these premises of $750,000, or $150,000 more than it is in fact assessed for by the city, exclusive of the playground.

The fact that these tenants entered into written leases for these premises is evidence that the jury could have considered upon the question whether the agreements were actually oppressive and under normal conditions, the tenants and the landlord would be substantially on an equality as to intelligence, enterprise, and freedom of movement; and no prejudice whatever would be created by a landlord demanding the utmost rent which the tenant could and in the result, would pay, as the American mind is imbued with the feeling that a thing is worth what it will bring and that rents are determined solely by competition. The legislature, however, has deter-

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mined that unusual conditions make it advisable that landlords' freedom to contract be limited, and that the rent they can charge for premises occupied for dwelling purposes shall no longer be regulated solely by competition.

Upon a similar application to set aside a jury's verdict, in the case of *Shapiro* v. *Goldstein*, 113 Misc. Rep. 258, I held that reasonableness of rent is a question of fact, and the question being submitted to the jury for their deliberation, the court could not set aside the results. The jury rendered a verdict in favor of the defendants upon the facts adduced and upon the court's charge as to law, and the court in its discretion would not be justified in setting aside the verdict and granting a new trial unless it is clearly demonstrated that the verdict thus rendered was by mistake, prejudice, passion or bias in the minds of the jury. *Berkowitz* v. *Consolidated Gas Co.*, 134 App. Div. 389-391; *Kingsley* v. *Finch, Pruyn & Co.*, 54 Misc. Rep. 317; *Dambmann* v. *Metropolitan Street Ry. Co.*, 55 id. 60; *Dallin* v. *Mayer*, 122 App. Div. 676, 677; *Wagner* v. *H. Herrmann Lumber Co.*, 121 N. Y. Supp. 607; *McCann* v. *New York & Queens County Ry. Co.*, 73 App. Div. 305; *Lyman* v. *John Anderson & Co.*, 4 id. 124. In the last case cited, it is pointed out wherein the trial court would be justified in setting aside a verdict as rendered by the jury. As I fail to find that the verdict was rendered contrary to the law or contrary to the evidence, the motion for a new trial must therefore be denied.

Motion denied.

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EMILIE FOGG, Respondent, v. THE MORRIS PLAN INSURANCE SOCIETY, Appellant.

(Supreme Court, Appellate Term, First Department, November, 1920, Term —Filed June, 1921.)

Principal and agent — when limitation of agent's authority should be unequivocal — life insurance — "Morris Plan" — interlocking companies — acceptance of overdue premiums — waiver.

Where an agent is in complete control of a business a limitation upon his authority should be unequivocal.

In an action brought by the beneficiary under a policy of life insurance issued by "The Morris Plan Insurance Society" in connection with a loan of money by the "Morris Plan Company" the defense was that the policy had lapsed for nonpayment of premiums and had not been reinstated. It was admitted, however, that prior to the death of the assured, all premiums had been paid in full to the "Company." *Held*, that whether the policy lapsed or not, plaintiff must prevail if the "Company" had power to bind the "Society" and reinstate the policy by its acceptance of overdue premiums.

Where from the record on appeal by the defendant from a judgment in favor of plaintiff entered on a verdict, it appears that the defendant "Society" in truth and in fact was nothing more nor less than an adjunct or feeder or instrumentality of the "Company" and the evidence discloses that these interlocking companies in conducting their joint and interlocking business placed in each other a most explicit trust and that only in the most technical sense can the Company be regarded as the Society's agent, yet it must be held that the "Company" had authority to waive the lapse in the payment of premiums, if lapse there was, and the judgment appealed from will be affirmed.

APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of The Bronx, second district, in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying defendant's motion for a new trial.

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Satterlee, Canfield & Stone (R. Randolph Hicks, of counsel), for appellant.

Max Gelles, for respondent.

MULLAN, J. The action is brought by a beneficiary named in a policy of life insurance issued by the defendant company, hereinafter called "Society," in connection with a loan of money by the Morris Plan Company, hereinafter called "Company." The defense is that the policy lapsed for non-payment of premiums, and that it was not reinstated. As the premiums were admittedly paid in full to Company prior to the death of the assured, plaintiff must prevail, whether or not the policy lapsed, if Company had the power to bind Society and reinstate the policy by its acceptance of overdue premiums. In order to ascertain Company's powers it is necessary to inquire into the relationship of the two corporations with each other, to examine the contract under which they were operating, and to discover their methods of dealing with Society's insurance business.

It appears that sometime prior to 1914 Company was incorporated for the avowed purpose of lending to worthy borrowers small sums of money, without the deposit of chattel security such as is required by pawnbrokers. That the lending of small sums is an enterprise that must be conducted at a loss unless more than six per cent interest is obtained is admitted by financial experts, and recognized by statutes permitting the pawnbroker to charge from twenty-four per cent to thirty per cent per annum. Company proposed to secure its loans, and an adequate return thereon, in the following manner, designated and widely known as the "Morris Plan." The loan is guaranteed by friends of the borrower, and must be repaid in instalments.

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At the time of making the loan, interest at six per cent is deducted therefrom, and Company secures a further return on its investment by compelling the borrower to purchase, in instalments, all of which are payable before repayment of the loan is due, a certificate of Company in amount equal to the amount of the loan. This certificate is pledged as collateral, and, when fully paid for, may be applied in satisfaction of the loan. Company in this way secures approximately fifteen per cent on its loan. Its plan is permitted by special statute, and has met with such marked success that in 1914 Company maintained offices in 104 cities in the United States, and had lent nearly $7,000,000.

In 1917, Company added to its plan a provision that the life of the borrower be insured for the amount of the loan, the policy being payable *pro tanto* to Company for any part of the loan unpaid at the death of the borrower. Whether distaste to enforce the loan against the guarantors, or the expense of such enforcement, or the profit in the insurance, was the motive for this innovation, does not appear. At all events, Society was, in 1917, organized to effectuate the new feature of the plan by writing the insurance the plan called for, and, immediately upon its organization, it appointed Company "its exclusive agent," by agreement in writing under which Company agreed to use its best efforts to induce "every borrower" and investor under the Morris Plan, "as well as other desirable persons," to make application to Society for insurance. Society transacted no other business than the issuing of life insurance policies securing Company's loans. It initiated no insurance business. Under this agreement Company was authorized to deliver the policies, and undertook to "collect *all* premiums," to "endeavor to collect *all* premiums in

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advance," and to account to Society therefor on Tuesday of each week, the account books so kept being the books of Society. The agreement contains no provision expressly forbidding the acceptance by Company of an overdue premium, the only limitation of its authority being that contained in paragraph 7 reading thus: "It is understood and agreed that the Company is not authorized to make, alter, change or discharge premiums, contracts, or policies, or bind the Society or represent the Society in any manner other than is set forth in this agreement unless authorized in writing."

On May 5, 1919, when Company and Society were operating under the plan as I have briefly outlined it, plaintiff's husband applied to Company for a loan of $500. Printed instructions were given to him by Company containing directions for filling out and executing the necessary papers, and stating that insurance for the term of one year, "sold through the Company," could be secured by weekly payments of fifty cents a week for a number of weeks determined by the age of the borrower, and stating further that such insurance is "optional with the borrower. The Company recommends it, but it is not a requirement of the loan." Although a pamphlet given to the assured by Company at the time contained the statement that only two guarantors were necessary, he was required to produce four, all of whom appear to have been satisfactory to Company. Nevertheless, for some reason the making of the loan was delayed. On May 28, 1919, the assured concluded that it would be to his interest to apply for the life insurance policy referred to by Company, and on that day, upon his making application to Company for insurance, and paying $5, stated by Company to be premiums on the policy for ten weeks, Company made the loan, the assured receiving

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the sum of $460, representing $500, the amount of the loan, less $35 interest retained by Company, and less $5 payment on account of insurance premiums. He was to pay for Company's certificate at the rate of $50 per month on the second day of each month, beginning with July, 1919.

While the agreement between Company and Society does not require a medical examination of the applicant, but merely that Company shall see the applicant and "believe him to be in good health," a medical examination was made in this instance, but not until September 4, 1919. The policy was issued on that day, but was not mailed to the assured until September twelfth, reaching him on September thirteenth. It was, however, dated May 28, 1919, and by its terms insured the assured for a term expiring May 28, 1920.

The policy is headed "The Morris Plan," in large black letters. Underneath, in white letters, is the word "Insurance." Underneath that is the word "Society," in black letters. Directly under the word "Morris" is the trade-mark of Company, a black rhomboid with the words "The Morris Plan" in the centre. Underneath that, in small but distinct black type, are the words "Home Office, 52 William Street, New York City."

The loan and policy were both applied for at one of the New York city offices of Company, at 261 Broadway. The assured never had any dealings with any representative of Society, other than Company, and was never at Society's office in William street.

The policy provides that weekly payments shall be made in advance; that conditions on the "following pages" are part of the contract; that payments are to be made until the full premium shall have been paid; that if the assured dies within one year from the date of the policy, while it is in force, the amount

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of the policy will, upon proof of death, be paid (1) to Company to liquidate any debt of the assured to Company, (2) the balance to the second beneficiary (in this case the plaintiff). The "conditions on the following pages" are that the policy cannot be changed except in writing, signed by certain officers of Society; that "no agent shall have power to waive forfeiture, or receive premiums on policies more than four weeks in arrears, or to receipt for same in the premium receipt book belonging with this policy, and all such arrears paid to an agent or other representative shall be at the risk of those who pay them, and shall not be credited upon the policy whether entered in the premium receipt book or not;" that the "policy shall lapse if any premium be more than four weeks overdue, but may be reinstated upon payment of all arrears and the presentation of evidence satisfactory to Society of the sound health of the insured."

The total premium on this policy, twelve dollars and fifty cents, was paid to and accepted by Company in three instalments, as follows: five dollars on May 28, 1919; two dollars and fifty cents on January 2, 1920; five dollars on February 2, 1920; each payment (other than the first) being made simultaneously with payment to Company of a loan instalment due on the same day. Company on none of these occasions demanded any evidence that the assured was in good health. In fact, the assured was in good health on January 2, 1920, but on February 2, 1920, he was ill. There can be no charge of bad faith against the plaintiff, the assured's wife, who paid the premium on the last-mentioned day. She waited until the day upon which the loan instalment was due, although her husband had been ill for ten days, and then paid the premium with the loan instalment. It is quite evident that neither the assured nor his wife had any reason

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to believe that a claim would be made that the policy had lapsed prior to January 2, 1920. Neither on that date, nor on February 2, 1920, was any question raised as to the validity of the policy. Upon making final payment, plaintiff was assured by Company that the premium was then paid in full, and was instructed by Company's cashier to keep the stamped book, as that was her receipt for the insurance. The assured died on February 3, 1920.

The plaintiff does not make the point that the policy did not lapse. I am of the opinion that a cogent argument might have been made in support of the proposition that no lapse occurred. The assured was charged premiums for a full year. In point of fact, the insurance written was for a period of only 259 days. The premium charged was fifty cents per week.

It should have been thirty-six cents per week. Society was prohibited from discriminating as among its policyholders. Ins. Law, § 89. By its excessive premium charges it did discriminate against assured, and its discrimination placed in the hands of Society, or at least in those of its agent Company, moneys that properly belonged to the assured, and which moneys had been paid in by the assured for the express purpose of paying premiums. On a non-discriminatory basis, there was at all times prior to the death of the assured a sufficient sum of money, properly belonging to the assured, to meet the assured's premium obligations. It is true that the statute does not provide for the application to payment of premium charges, moneys improperly exacted by discrimination, but it seems to me that it should not be beyond the power of courts to deem them so applied in order to prevent a forfeiture. For a statutory analogy, see Insurance Law, section 88, providing for such an application of moneys due to a policyholder as dividends. The plaintiff places

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sole reliance, however, upon her contention that any lapse that occurred was waived. I come, then, to a consideration of that question. Concededly, there was such a waiver provided Company was authorized to accept over-due premiums and thereby reinstate the policy. I do not think there is any provision in the policy that can be given the effect of limiting the authority of Company. The policy does contain the statement, or warning, or notice, or whatever it may be called, that "no agent shall have power to waive forfeiture, or receive premiums on policies more than four weeks in arrears." But in the agreement between Society and Company there was, in fact, no limitation whatsoever of the authority of Company, thereby made Society's "exclusive agent." Furthermore, it is very plain that Society, in real fact and substance, is a mere department of Company. Not only had Society given to Company the power to transact all Society's business, and to keep all its records, but Society in practice had nothing to do with either policyholder or policy after issuance of a policy. Company was in such complete control of the insurance feature of the Morris Plan that Society had not even its own independent means of ascertaining the correctness of a date of lapse given by Company. The date given on Company's notice of the alleged lapse of the policy here in question is an obviously incorrect date, and yet it was blindly accepted by Society as the correct date. Society makes much of the fact that Company failed to account to it in respect of the premiums accepted by Company from the assured. It seems, however, that the provision in the agreement between Society and Company for fixed periodic accountings was, in practice, wholly disregarded. It is quite apparent that these interlocking companies in conducting their joint and interlocking business placed

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in each other, as was quite natural in the circumstances, the most implicit trust, and that only in the most technical sense can Company be regarded as Society's agent. When, as here, an agent is in complete control of a business, a limitation upon its authority should be unequivocal. As I read this record, Society, in truth and fact, was nothing more nor less than an adjunct, or feeder, or instrumentality of Company.

I think it follows that Company possessed authority to waive the lapse, if lapse there was, and I advise that the judgment rendered by the learned trial justice be affirmed.

BIJUR and WHITAKER, JJ., concur.

Judgment affirmed, with twenty-five dollars costs.

PHILIP WALLACH, Appellant, *v.* MORRIS MENDELSON et al., Respondents.

(Supreme Court, Appellate Term, First Department, December, 1920, Term — Filed June, 1921.)

Pleadings — when allegations as to employment do not show an agreement based upon a sufficient consideration.

Allegations that plaintiff agreed to continue in the employ of defendants as salesman during the season of 1918, to procure orders for furs, and that as compensation and for his commissions defendants agreed to pay him on all orders procured by him and accepted by them and for reorders on the same, "as follows," etc., do not show an agreement based on a sufficient consideration.

In an action for commissions alleged to have been earned as salesman under the contract the plaintiff had a verdict by direction of the court, but a second cause of action pleaded in the complaint, for a wrongful discharge from employment, was dismissed. *Held*, that no error was committed either in dis-

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missing the second cause of action or in denying plaintiff's motion to amend the first cause of action in order to increase the demand for damages.

APPEAL by the plaintiff from a judgment of the City Court of the city of New York, entered in favor of the defendants dismissing the second cause of action set forth in the complaint and from an order denying the motion of plaintiff to set aside said dismissal and for a new trial, and denying the motion of the plaintiff to amend the first cause of action by increasing the amount of demand.

Samuel Wallach, for appellant.

Louis Dorfman (I. Balch Louis, of counsel), for respondents.

LEHMAN, J. The plaintiff herein has set forth in his complaint a cause of action for commissions earned as a salesman in the defendants' employ and he has pleaded as a second cause of action a wrongful discharge under the contract of employment. At the trial a verdict was directed in favor of the plaintiff for the commissions claimed in the first cause of action but the trial justice dismissed the second cause of action. The plaintiff now appeals from the judgment in his favor on the ground that the trial justice erred in denying a motion to amend the first cause of action in order to increase the damages and in dismissing the second cause of action. The denial of the plaintiff's motion to amend made at a second trial of the case was well within the discretion of the trial justice and the only serious question we need consider is whether the complaint sets forth a cause of action for wrongful discharge under the contract of employment. The complaint alleges " that the plaintiff and the defendants entered into an agreement whereby the plaintiff agreed to continue in the employ of the defendants

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as salesman for the season of 1918, to procure orders for furs for the defendants and as compensation therefor and as and for his commissions the defendants agreed to pay the plaintiff on all orders procured by the plaintiff and accepted by the defendants and re-orders on the same, as follows." The trial justice has held that these allegations do not show a valid agreement based on sufficient consideration.

It is to be noted that each party has made an express promise. The plaintiff agrees "to continue in the employ of the defendants as salesman for the season of 1918" and the defendant agrees to pay certain commissions on orders procured by the plaintiff. The plaintiff's promise is however purely illusory and can constitute no consideration for the defendants' agreement if the plaintiff "has it in his power to keep his promise and yet escape performance of anything detrimental to himself or beneficial to the promisee." Williston Cont. § 104. If the plaintiff has under his agreement the power to keep his promise to continue in the employ of the defendant and yet devote to his employment as much or as little time as he chooses, or in fact to perform no services under his employment, then the performance of his promise would clearly constitute no detriment to him and no benefit to the defendants, whereas if the plaintiff is bound to devote reasonable time and make reasonable efforts to procure orders, then his promise constitutes sufficient consideration for the defendants' counter promise. Undoubtedly where a complaint alleges an employment for a definite purpose or to do a definite piece of work, the employee ordinarily impliedly agrees to devote to his employment sufficient time to accomplish the result for which he is employed, but I cannot find that in the present case such an agreement can be implied. The plaintiff is bound to allege in his com-

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plaint a contract which is valid and the court cannot add to the contract as alleged, any new term which is not necessarily implied in the contract as set forth. In the present case it does not appear that the plaintiff was to be subject to the directions of the defendants in regard to the manner in which he should attempt to procure orders and it would appear from the colloquy at the trial that the plaintiff agreed merely to act as salesman for the defendants in connection with other goods received from other parties, which he intended to offer for sale at the same time. If he made successful efforts to procure orders for defendants' goods he would obtain his commissions and the defendants would obtain the benefit of the orders actually procured and on the other hand, if the plaintiff failed to make any efforts he would sustain no detriment and the defendants would obtain no benefit from the making of the agreement set forth in the complaint. While the courts have in some cases found that an agreement to use reasonable efforts to sell goods should be implied from an employment as salesman, it based such finding of an implied term upon surrounding circumstances which do not exist in the present case. In *Wood* v. *Duff-Gordon*, 222 N. Y. 88, which seems now to be the leading case upon this subject in this state, the court found that such a term could reasonably be implied in a contract whereby one party gave to the other an exclusive agency for the sale of its goods for a profit in return for one-half of all the profits obtained from such sales, on the ground that it would be unreasonable to suppose that an exclusive agency would be conferred unless fair compensation was paid for the grant of such agency and the parties must have contemplated that the agent would be bound to use reasonable efforts to bring the profits upon which the compensation was

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to be based, into existence. In the present case however we are asked to draw such an inference not merely as a finding of fact but as a necessary inference of law, even though there are no surrounding circumstances set forth which would make a contrary finding unreasonable. The defendants may well have agreed to employ the plaintiff to procure orders for them knowing that if the plaintiff did procure orders for them they would benefit by his efforts and if he failed to do so they would suffer no injury by agreeing to give him the opportunity to obtain orders and to pay commissions for orders actually obtained and the plaintiff may well have agreed to continue in their employ as a salesman knowing that he would suffer no detriment other than the loss of possible commissions if he failed to make any efforts to sell the defendants' goods.

For these reasons the judgment should be affirmed, with twenty-five dollars costs to the respondent.

GUY, J., concurring in the result.

Judgment affirmed, with twenty-five dollars costs to respondent.

CHARLES GREENBERG and Another, Appellants, *v.* NATHAN MAGER et al., Respondents.

(Supreme Court, Appellate Term, First Department, February Term — Filed June, 1921.)

Contracts — glaziers — breaking of windows by third persons during progress of work — stopping payment of check given for work — when an agreement is entire, performance pro tanto as the work progresses need not be accepted.

Plaintiffs agreed to furnish and set for defendants seven lights of glass in a store front and also to set one light of glass

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to be furnished by defendant, all for $700. While plaintiffs were engaged in the work and after two lights had been set, they were broken by some persons unconnected with the parties, and apparently because of a strike in the glass trade. The light furnished by defendants, though broken at the same time, was set under instructions from them. Under police protection four of the other lights furnished by plaintiffs were set and the remaining one was not set because of defendants' request. After plaintiff had commenced setting the lights and before the two were broken they received a check from defendants for $700. In an action on the check, payment of which had been stopped, *held*, that a dismissal of the complaint upon the theory that plaintiffs had not performed their agreement will be affirmed on the ground that the agreement being entire, performance *pro tanto* as the work progressed could not be accepted.

APPEAL by plaintiffs from a judgment of the Municipal Court of the city of New York, borough of Manhattan, sixth district, in favor of the defendants, after trial by the court without a jury.

William L. Greenfogel, for appellants.

Louis R. Glantz, for respondents.

MULLAN, J. Plaintiffs, glaziers, agreed verbally with defendants, general contractors who were constructing a store front, to furnish and set seven lights of glass, and also to set a light of glass to be furnished by defendants, all for the sum of $700. Plaintiffs brought to the store premises the panes of glass to be furnished by them, and proceeded to set them. While so engaged, and after two of the lights had been set, some persons, unconnected with any of the parties, and apparently because of a strike in the glass trade, broke the two lights that had been set, and also a third light, which last-mentioned light was the one defendants had agreed to, and did,

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furnish. This last-mentioned light was thereafter set, in a broken condition, under instructions from defendants. After police protection had been procured, the plaintiffs continued with their work and set four of the other five lights furnished by them. The remaining light, the seventh of those to be furnished by plaintiffs, was to be set in a door that had been taken down, and this light was not set because of defendants' request that the setting of it be left to defendants, who desired to set the light themselves at a later time. After plaintiffs had commenced their work of setting the lights, and prior to the breaking of the lights, defendants gave plaintiffs their check for $700. Subsequently, defendants stopped payment of the check, and this action is upon the check. The learned trial justice dismissed the complaint upon the theory that the plaintiffs had not performed.

There is no difficulty in respect either of the light furnished by defendants, or of the door-light furnished by plaintiffs. As to both, there was a waiver of the setting. The question whether there was performance in respect of the other lights, has, however, given us not a little trouble. The agreement was entire, but is there any implied stipulation of it that would justify a finding that the setting of any light was to be accepted as performance, *pro tanto,* as the work of setting progressed? We are of the opinion, after a very protracted consideration of the matter, that that question must receive a negative answer. We are unable to draw any satisfactory distinction between the agreement under examination, and one to furnish and set a single window composed of several panes of glass, and, as to the latter, we think the engagement of the person setting the window would not be performance unless, at the completion of the setting, the window so set was intact

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and complete. The test, we think, is this,—could the plaintiffs, after setting some of the lights, have substituted others for them? *Tompkins* v. *Dudley*, 25 N. Y. 272; *Adams* v. *Nichols*, 19 Pick. 275. No distinction may be drawn between the doing of something upon a building, and the doing of something upon a chattel. Cases *supra*. While one's instinctive reaction may be in favor of a person situated as are the plaintiffs here, we think the rule of law requires us to sustain the ruling of the trial court. We feel, however, that the question should be passed upon by the Appellate Division, and we shall grant leave to plaintiffs to appeal to that court.

Judgment affirmed, with twenty-five dollars costs, with leave to appellants to appeal to the Appellate Division.

LEHMAN and BURR, JJ., concur.

Judgment affirmed, with twenty-five dollars costs.

THE A. C. & H. M. HALL REALTY COMPANY, Respondent, *v.* LEON SIDNEY MOOS and Fifteen Others, Appellants.

(Supreme Court, Appellate Term, First Department, May Term — Filed June, 1921.)

Landlord and tenant — use and occupation — landlord entitled to reasonable income on his investment in the city of New York — evidence of market value of property incompetent — bill of particulars — Laws of 1920, chap. 944.

Where the tenants of a dwelling house in the city of New York, without the permission of the landlord, hold over and continue in possession after September 30, 1920, when their leases expired, the landlord, under chapter 944 of the Laws of 1920, is entitled to bring an action to recover a fair and reason-

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able rent while the tenants remain in possession, but he may recover only such rentals as will yield a reasonable income on his investment.

In such an action, evidence as to the present market value of the premises largely based upon the excessive rentals charged by owners of similar property, which led to the emergency which the statute declared existed and which it was intended to remedy, is incompetent on the ground that to receive it would be to justify extortionate demands by proof that they have resulted in an increase in the market value of similar property, and the admission of such evidence over the objection and exception of the defendants was error for which a judgment in favor of plaintiff will be reversed and a new trial ordered.

The provision of the statute relating to the bill of particulars to be filed by a landlord cannot be deemed to include matters dealing with present market values which can in no sense affect the net income to which the landlord was entitled, and the granting of a motion for leave to amend the bill of particulars to conform to the proof was also erroneous.

The purpose of the provision for the bill of particulars is to limit the landlord to such proof as may be met by the tenant as to the amount of investment from which the landlord is permitted to realize a reasonable income and the cost of maintenance of the premises, but an item of annual expenses for salaries of officials of the plaintiff, which evidently formed some basis for the rental value fixed by the court, is not justified.

APPEAL by the defendants from a judgment of the Municipal Court of the city of New York, borough of Manhattan, fifth district, in favor of the plaintiff.

Goldman & Unger (William F. Unger and Samuel Rubin, of counsel), for appellants.

Stotesbury & Miner (Louis W. Stotesbury, of counsel), for respondent.

GUY, J. The tenants herein were in possession under leases which expired on September 30, 1920, and the complaint alleges that defendants wrongfully held over and continued in possession of premises

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occupied by them after the expiration of said leases without permission of the landlord, and demands judgment for the reasonable value of the premises so occupied by defendants.

Before the enactment of recent legislation the landlord would have had the option of treating the tenants either as trespassers or as tenants under a new hiring upon the same terms as the previous leases. By chapter 944, Laws of 1920, this right of the landlord has been suspended and a new form of tenancy created under which a tenant is permitted to remain in possession without permission of the landlord, and the landlord may bring an action to recover a fair and reasonable rent for the premises while in possession of the tenant. See *Rogan* v. *Weiss,* 115 Misc. Rep. 193. This action was, therefore, brought in proper form; and the contention of defendants-appellants, that they must be treated either as trespassers, in which event the complaint should have been dismissed, or as tenants for a new hiring under the terms of their old leases, is erroneous.

The only remaining questions to be considered are, *first,* whether incompetent evidence was admitted upon the question of reasonable rental value; and, *second,* whether the evidence sustains the finding of the trial judge as to the reasonable rental value of the premises. Over the objection and exception of counsel for the tenants, proof was admitted as to the present market value of the premises, a value largely based upon the excessive rentals charged by owners of similar property, which led to the emergency the statute declared existed and which the statute was intended to remedy. In other words, to permit this line of proof would be to justify extortionate demands on the part of landlords by proof that the extortionate demands had resulted in an increase of market

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value for similar property. It was clearly the intent of the legislature that a landlord should be restricted to such rentals as would yield, not a reasonable income on values created by profiteering methods, but a reasonable income on his investment. The admission of such proof was highly prejudicial to the defendants.

A motion was granted by the trial court to amend the bill of particulars to conform to the proof so as to include therein matters not contemplated by the statute. The statute provides that the bill of particulars shall set forth the gross income derived from the building, the number of apartments, rooms and stores, the rent received for each for the period of one year last past, the consideration paid by the landlord for the building, the assessed valuation of the property and the taxes for the current year, the annual interest charge on any incumbrance paid by the landlord, the operating expenses with reasonable detail, "and such other facts as the landlord claims affect his net income from such property." This provision cannot possibly be deemed to include matters dealing with present market values, which can in no sense affect the net income to which the landlord was entitled. The granting of said motion was, therefore, equally erroneous.

The inclusion in the item of annual expenses of $10,000 for salaries of officials of the plaintiff company, which evidently formed some basis for the rental value fixed by the court, is also unjustifiable. The purpose of the statutory provision for the bill of particulars is to limit the landlord to such proof as may be met by the tenant as to the amount of the investment from which the landlord is permitted to realize a reasonable income, and the cost of maintenance of the premises — not the cost of maintenance

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of a corporation that may or may not have a much larger and wider field of operation.

For the above reasons the judgment must be reversed and a new trial ordered, with thirty dollars costs to appellants to abide the event; said costs as of one appeal.

BIJUR and MCCOOK, JJ., concur.

Judgment reversed and new trial ordered, with thirty dollars costs to appellants to abide event.

ROSMAN REALTY CORPORATION, Etc., Landlord, Respondent, *v.* JAMES F. QUINN, Tenant, Appellant.

(Supreme Court, Appellate Term, First Department, May Term — Filed June, 1921.)

Summary proceedings — landlord and tenant — improving existing building is not "demolishing the same with the intention of constructing a new building" — Laws of 1920, chap. 942.

The plans and specifications for changes in a seven-story corner apartment house in the city of New York were designed to convert it into a building to provide for twenty-five families, and, in substance, the physical changes consisted in the removal of a great many partitions, the installation of two new bathrooms and toilets on each floor, the introduction of new dumbwaiter shafts and new plumbing throughout the building and the erection of an additional fire escape, but no interference was contemplated with the foundations, walls, roofs or floors. *Held*, that there was no intention to demolish the building for the purpose of erecting a new one, within the meaning of chapter 942 of the Laws of 1920, and a final order in favor of the landlord in summary proceedings will be reversed and the petition dismissed.

APPEAL by the tenant from a final order of the Municipal Court of the city of New York, borough of

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Manhattan, fifth district, in favor of the landlord, after a trial by a judge without a jury.

Francis Colety, for appellant.

Oliver E. Davis, for respondent.

BIJUR, J. The only question presented by this appeal is whether the premises affected come within the description of chapter 942 of the Laws of 1920, namely, whether the landlord desired "in good faith to recover the premises for the purpose of *demolishing the same* with the intention of constructing a *new building.*" The premises are a seven-story corner apartment house about 55 by 100 feet, arranged to house twelve families. The plans and specifications for changes therein were designed to convert it into a building to provide for twenty-five families, and the physical changes consisted in substance of the removal of a great many of the partitions, the installation of two new bathrooms and toilets on each floor, the introduction of new dumbwaiter shafts and new plumbing throughout the building and the erection of an additional fire escape. No interference was contemplated with the foundations, walls, roofs or floors of the structure.

It seems to me to be self evident that it was not intended to demolish this building for the purpose of constructing a new one within the meaning of the legislature. While the changes contemplated were radical in many senses, we are not concerned with that feature of the case. The legislature in its discretion has established a test which is clear and free from ambiguity.

As was well said in *McCluskey* v. *Cromwell*, 11 N. Y. 593, 601: "But in the construction, both of statutes and contracts, the intent of the framers and parties is to be sought first of all, in the words and

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language employed, and if the words are free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation, and when the words have a definite and precise meaning, to go elsewhere in search of conjecture in order to restrict or extend the meaning. Statutes and contracts should be read and understood according to the natural and most obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation. Courts cannot correct supposed errors, omissions or defects in legislation, or vary by construction, the contracts of parties. The office of interpretation is to bring sense out of the words used, and not bring a sense into them."

Order reversed, with thirty dollars costs and petition dismissed, with costs.

GUY and MCCOOK, JJ., concur.

Order reversed, with thirty dollars costs.

ERNEST F. PINNER, Respondent, *v.* NATHAN LEDER, Appellant.

(Supreme Court, Appellate Term, First Department, May Term — Filed June, 1921.)

Partnership — oral agreement — Statute of Frauds — contracts — consideration.

A consent to the cancellation of an oral agreement for a three-year partnership, given by one of the parties at the request of the other, is a sufficient consideration for his promise to pay a certain sum for such consent, and an action lies to recover any balance due thereon.

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APPEAL by defendant from a judgment of the Municipal Court of the city of New York, borough of Manhattan, sixth district, in favor of plaintiff, after trial by a judge without a jury.

Albert E. Schwartz, for appellant.

Bartholomew B. Coyne, for respondent.

BIJUR, J. The parties hereto had entered into an oral agreement for a three-year partnership. Before the beginning of the term the defendant desired to withdraw from the contract and agreed to pay plaintiff $800 for plaintiff's consent to defendant's withdrawal. This action is to recover the balance of the $800, $200 having been paid on account.

Defendant, appellant, claims that there was no consideration for his promise to pay the amount sued for because of the familiar principle expressed in *Carpenter* v. *Taylor,* 164 N. Y. 171, 177, that "A promise by one party to do that which he is already under a legal obligation to perform is insufficient as a consideration to support a contract." Appellant seeks to apply this principle to the instant case by reasoning that an oral partnership for three years is void under the Statute of Frauds, and that, consequently, defendant was at liberty to withdraw therefrom at any time. Respondent urges that so recently as in *Sanger* v. *French,* 157 N. Y. 213, 234, doubt has been expressed whether an agreement of partnership is covered by the statute.

It is true that in the opinions in a number of cases some such doubt has been expressed, but it is rather *arguendo.* Whenever the question has arisen directly it seems to me that the decision has always been that the contract falls within the statute. *Wahl* v. *Barnum,* 116 N. Y. 87; *Butler* v. *Dinan,* 19 N. Y. Supp. 950;

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affd., 139 N. Y. 613. There appears to have been some misunderstanding of the significance of the chancellor's decision in *Smith* v. *Tarlton*, 2 Barb. Ch. 336, which, as I read that case, turned upon the peculiar terms of the contract there under consideration. See also *National Bank* v. *Van Derwerker*, 74 N. Y. 234; *Traphagen* v. *Burt*, 67 id. 30; *Coleman* v. *Eyre*, 45 id. 38. I can see no reason why an agreement for a partnership to continue for more than three years should not be regarded like any other contract which by its terms is not to be performed within one year — in the language of the statute.

There is, however, an altogether different consideration to be taken into account in the instant case. An oral agreement described in the Statute of Frauds is not void in and of itself but only void *under the statute*, and the plea of its invalidity must be affirmatively interposed. In default of such plea it is treated by the courts as perfectly valid. *Porter* v. *Wormser*, 94 N. Y. 431, 450; *Matthews* v. *Matthews*, 154 id. 288, 291, 292. The mere fact that a contract is terminable at the will of one party renders it none the less a contract recognized as valid and subsisting until such determination. See *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, 251; *Realty Advertising Co.* v. *Englebert Tyre Co.*, 89 Misc. Rep. 371.

In view of this established principle, I am of opinion that the consent of the plaintiff, given at defendant's request, to a cancellation of the contract into which they had entered was sufficient consideration for defendant's promise to pay the sum sued for. I advise, therefore, that the judgment appealed from be affirmed, with twenty-five dollars costs.

GUY and MCCOOK, JJ., concur.

Judgment affirmed, with twenty-five dollars costs.

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MOLLIE BESNAR, Appellant, *v.* AMERICAN RAILWAY EXPRESS COMPANY and BERNARD NASH, Respondents.

(Supreme Court, Appellate Term, First Department, May Term — Filed June, 1921.)

Master and servant — negligence — when employer not liable for negligent act of employee acting without the scope of his employment — personal intermeddling.

While plaintiff, the regular operator of the freight elevator in an office building, was waiting for the operator of the passenger elevator to finish his shift at one o'clock, she was told by the superintendent of the building to clean the hall, and while so engaged a collector of packages for an express company requested her to take him up in the freight elevator. While she went to obtain the superintendent's permission to do so, the package collector entered the elevator and proceeded with it to the tenth floor, and upon plaintiff's return, apparently finding the elevator in the same position, she stepped into the vacant elevator shaft and was injured. In an action against the express company, *held,* that in the circumstances the package collector's use of the elevator was not within the scope of his employment as an employee of the defendant, but constituted personal intermeddling, and an order setting aside a verdict in plaintiff's favor, as contrary to law, will be affirmed, with leave to appeal to the Appellate Division.

Guy, J., dissenting.

APPEAL by plaintiff from an order of the City Court of the city of New York, setting aside a verdict in plaintiff's favor.

Myron Wisoff, for appellant.

Edward V. Conwell, for respondent, American Express Company.

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McCOOK, J. Plaintiff appeals from an order setting aside the verdict of a jury in her favor on the ground that it was contrary to law.

The action was brought to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant company, the defendant Nash, who was not served, being admittedly at that time in its employ. Part of Nash's duty was to collect packages for the defendant company from the various offices in the ten-story building where the accident occurred. Plaintiff was employed by the Revelle Realty and Security Company, the owner of the building, as the regular operator of the freight elevator. On the day of the accident, plaintiff had been running the freight elevator all the morning, and then shut it off and was waiting until one o'clock in the afternoon, when she was to go on the passenger elevator and operate that until five o'clock. While waiting for the operator of the passenger elevator to finish his shift at one o'clock, plaintiff was told by the superintendent of the building to clean the hall. While she was thus engaged, the defendant Nash entered the building and requested her to take him up in the freight elevator. She replied telling him to wait a couple of minutes while she finished the hall; she then left the work she was doing, obtained the superintendent's permission, returned to the elevator, and, finding it apparently in the same position, stepped through the door into the vacant elevator shaft and was injured. The evidence shows that Nash, during her absence, entered the elevator and proceeded with it to the tenth floor of the building.

The plaintiff expressed herself on the stand with difficulty, but this is the substance and effect of her story.

No question of contributory negligence is presented

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on this appeal, since no contention was made, either during the trial or on the motion to set aside the verdict, that the plaintiff had been guilty of contributory negligence as matter of law.

The sole question involved is whether Nash in using the elevator under the circumstances described was acting within the scope of his employment as an employee of the defendant company. In my opinion running the elevator under the conditions as they existed in this building at the time cannot fairly or reasonably be deemed an ordinary and natural incident or attribute of his employment, or a natural, direct and logical result of it. There is, and in the nature of things could be, no proof in the record that Nash was authorized by the express company to operate elevators in buildings in which he collected packages, and he could not have believed such an act to pertain to his service, which was the collection of packages. Employees of the building, including the plaintiff, were employed to operate the elevators, and at the very time Nash acted he was, following a conversation between himself and the plaintiff, waiting for her, as he had requested, to come back and carry him up. The conduct of Nash in taking this elevator without permission constituted personal intermeddling, which has not even the justification of being necessary to save him a few steps.

Order affirmed, with costs to respondents to abide the event and with leave to appellant to appeal to the Appellate Division, first department.

GUY, J. (dissenting). Plaintiff appeals from an order setting aside the verdict of a jury in her favor on the ground that it was "contrary to law."

The action was brought to recover damages for personal injuries alleged to have been sustained through

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the negligence of the defendant company, the defendant Nash, who was not served, being admittedly at that time in the employ of the defendant express company. It was conceded that it was part of Nash's duties to collect packages for the defendant company from the various offices in the ten-story building where the accident occurred. Plaintiff was employed by the owner of the building as a cleaner, and it was part of her duties at times to run the freight elevator from the basement up through the building. On the morning the accident occurred, while plaintiff was engaged in cleaning, the defendant Nash entered the building and requested her to take him up in the freight elevator. She replied that she would have to ask the foreman, and immediately left her work, went in search of the foreman, obtained his permission to take Nash up in the elevator, returned to the elevator, and, finding it apparently in the same position she had left it, stepped through the door of the elevator into the vacant elevator shaft and was injured. The evidence showed that Nash, in her absence, had entered the elevator and proceeded with it to the floors above.

No question of contributory negligence is presented on this appeal, there having been no contention either on the trial or on the motion to set aside the verdict that the plaintiff had been guilty of contributory negligence as matter of law.

The sole question involved on this appeal is whether Nash in using the elevator in the absence of the operator was acting within the scope of his employment as an employee of the defendant company. The learned trial court and my learned associates have assumed that in the absence of proof that Nash was specifically employed to run an elevator, his act in so doing was not within the scope of his employment. I think this conclusion erroneous. The

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general rule is " For the acts of the servant, within the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interest, the master will be responsible, whether the act be done negligently, wantonly or even wilfully." *Mott* v. *Consumers Ice Co.*, 73 N. Y. 543, 547, cited with approval in *Muller* v. *Hillenbrand*, 227 id. 448, 451. See, also, *Einhorn* v. *W. 67th St. Garage*, 177 N. Y. Supp. 887; *Jones* v. *Wiegand*, 119 id. 441; 134 App. Div. 644; *Wooding* v. *Thom*, 148 id. 21; *Lewis* v. *Natl. Cash Reg. Co.*, 87 Atl. Repr. 345; 84 N. J. Law, 598.

The verdict in favor of the plaintiff was supported by competent evidence and was not contrary to law. The order should, therefore, be reversed and the verdict reinstated, with costs of appeal in this court and the court below.

Order affirmed, with costs to respondents to abide event.

THE PEOPLE OF THE STATE OF NEW YORK ex rel. JACOB RUPPERT REALTY CORPORATION, Relator, *v.* JACOB A. CANTOR and Others, as Commissioners of Taxes and Assessments of the City of New York, Respondents.

(Supreme Court, Bronx Special Term for Trials, June, 1921.)

Taxation — jurisdiction of commissioner of taxes, etc., in New York city — assessment of property of manufacturing corporation — when objection to form of complaint and procedure deemed waived — owner of property is " party aggrieved " within section 290 of the Tax Law and section 906 of Greater New York charter, though tenant bound to pay taxes — certiorari — review of assessment for overvaluation — boilers, generators, etc., in buildings assessable as real estate — Tax Law, §§ 37, 219-j, 219-l — Greater New York charter, § 895 — assessment reduced.

All that is necessary to the exercise of jurisdiction by the commissioner of taxes and assessments of the city of New York

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to hear and determine a complaint in relation to an assessment upon property under section 895 of the Greater New York charter is, that within the statutory time limit a complaint in writing stating the grounds of objection to the assessment be presented to the commissioner. (P. 527.)

The form of the complaint, the particularity with which the property shall be described or the objections specified, are mere matters of procedure and do not go to the jurisdiction. (Id.)

The rule that technical objections to the form or sufficiency of pleading are waived if not taken in advance by proceeding to a hearing upon the merits, applies to proceedings before said tax commissioner to have an assessment revised. (Id.)

Where the application for the revision of such an assessment meets all the requirements of section 37 of the Tax Law and of section 895 of the Greater New York charter and is referred to a deputy tax commissioner for reexamination, and the hearing upon the merits is had without objection at any time being made to the form or sufficiency of the application, a reassessment may not be denied on the sole ground that the application was insufficient; the objections are deemed to have been waived. (Pp. 526–528.)

The legislature in retaining by section 290 of the Tax Law and section 906 of the Greater New York charter the statutory remedies heretofore provided for the revision and correction of assessments by a writ of certiorari, did not intend to exclude from its benefits an owner of property whose tenant by its lease was obligated to and did pay the taxes assessed against the property, and relator, the owner of the property in question here, is clearly a "party aggrieved" within section 290 of the Tax Law and section 906 of the Greater New York charter and entitled to maintain certiorari proceedings to review and correct an assessment against its property. (Pp. 529–533.)

The relator, a domestic manufacturing and mercantile corporation, is the owner of a plot of land in the city of New York, having a frontage of 250 feet on each of two streets and a depth of 200 feet, upon which there are a four-story freezing house, a four-story engine building and a six-story boiler house. In the total assessment of $400,000 upon the real estate in question for each of the years 1918, 1919 and 1920, there was included the alleged value of machinery and equipment in the buildings amounting to $133,000, which relator, on certiorari to review the assessment as erroneous for overvaluation,

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claimed was personal property and exempt from taxation under sections 219-j and 219-l of article 9-A of the Tax Law, and that the true valuation of the real estate was $267,000, which claims were denied by the return to the writ of certiorari. (Pp. 522, 523.) *Held*, that relator having by a preponderance of proof overcome the presumption that the machinery and equipment could not be removed without material injury to the buildings, a finding that all such machinery and equipment, with the exception of boilers, generators and main shafting, were so removable and not essential to the support of the buildings, is justified, and the conclusion follows, that all the machinery and equipment included in the machinery assessment, except as above stated, was personal property, not assessable as real estate, and therefore exempt from local taxation during the years in question. (Pp. 538, 539.)

A contention of the relator that under section 219-l of the Tax Law as it stood when it was amended in 1919, only two of the six boilers used for the purpose of operating an ice-plant are taxable, because two is the maximum number which would be required to operate machinery in an ordinary building of the same size as relator's, is untenable. Within the purview of said statute, which exempts boilers from the exemption therein provided, all six boilers are an integral part of the building and so long as they remain therein are assessable as real estate. (Pp. 539, 540.)

The actual market value on the taxable status dates of all the boilers as well as of the generators, main shafting and pulleys, concededly taxable, amounting in the aggregate to $36,105, as found by the court, must be deducted from the actual market value of the machinery and equipment included in the machinery assessment of $133,000, as of the several taxable status dates, and added to the building assessment. (P. 541.)

The relator having fully established all the prerequisites necessary for a correction of the assessments and the court having found that on the several taxable status dates the actual market value of the land was $80,000 and the actual market value of the buildings was $187,000, to which should be added the $36,105, deducted from the actual market value of the machinery and equipment on said dates it is accordingly *held*, that there was an overvaluation in each of the years in question, to the extent of $96,895, and the several assessments will be reduced to the sum of $303,105. (Pp. 544, 545.)

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CERTIORARI proceedings to review and correct assessments for taxes.

James M. Vincent (Curtis A. Peters, of counsel), for relator.

John P. O'Brien, Corporation Counsel (Harry S. Lucia, of counsel), for respondents.

GIEGERICH, J. These three proceedings were instituted to review and correct the several assessments made by the respondents for the purpose of taxation for the years 1918, 1919 and 1920 of the real estate of the relator in the borough of The Bronx, city of New York, designated as section 9, in block 2308, lot 5, and which premises are also known as Nos. 280 to 302 East One Hundred and Thirty-third street, borough of The Bronx, city of New York. By the stipulation of the parties made in open court the three proceedings were tried as one, and it was agreed that the evidence adduced should be considered as the evidence in each of them. The real property affected by these proceedings consisted of a plot of land on the south side of East One Hundred and Thirty-third street, running through to the north side of One Hundred and Thirty-second street, and having a frontage of 250 feet on each street and a depth of 200 feet. The buildings on the said premises consisted of a four-story building used as a freezing house, a four-story building used as an engine building, and a six-story building used as a boiler house. The petition in each of these proceedings alleges that the relator is a domestic manufacturing and mercantile corporation, and is the owner of the property in suit, and that the assessment is erroneous by reason of overvaluation, in that there was included in the total assessment of the real estate, viz., $400,000, the alleged value of machinery and equipment therein, amounting to $133,000, which is claimed by the relator to be per-

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sonal property, and that the true valuation of the real property in question is $267,000, which several claims are denied by the return of the respondents in each of these proceedings and each of said returns, among other things, alleges that the assessment represented no more than the fair market value of the property on the taxable status dates, and requested that no reduction be made if the actual value of the property and improvements were not less than the total assessments. The total assessment in each of the said years was $400,000. The alleged valuation of such real estate was set down in two columns in the annual records in the borough of The Bronx for the said years, as follows: Value of real estate, unimproved, $80,000; value of real estate, with improvements, $400,000. Such separate entries were made pursuant to section 892 of the Greater New York charter, which provides "that the assessed value of real estate shall be set down in two columns; in the first column shall be given, opposite each separately assessed parcel of real estate, the sum for which such parcel under ordinary circumstances, would sell if wholly unimproved; and in the second column shall be set down the sum for which the said parcel under ordinary circumstances would sell, with the improvements, if any, thereon." During the time the books of annual record were open for inspection the relator in each of the years above mentioned filed with the department of taxes and assessments an application in writing, duly verified, claiming that such assessed valuation was erroneous by reason of over-valuation; that the machinery contained in the buildings, of the value of $133,000, was exempt under the so-called "Emerson Law," and asking that the assessed value of the said premises be fixed at $267,000. It appears from the allegations contained in the respondents' return in

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each of these proceedings that a date was fixed for a hearing on each of the said applications, and due notice of such hearing was given to the person filing the same; that at such hearing there was no appearance on behalf of the relator, and no testimony was taken and no other papers were filed in support of the said applications. It further appears from the return in each of these proceedings, as amended pursuant to the stipulation signed by the attorneys for the respective parties, that each of the said applications was referred to the deputy tax commissioner who made the respective assessments, with instructions to re-examine the property and report to the board of taxes and assessments, and said deputy reported that he had re-examined the property; that the land factor was $200 and $120; that the building factor was $1.25 and $1, being 1, 2, 4 and 5 stories high, with 147,500 square feet of floor space, and the condition of improvements and general surroundings was good, and that the property consisted of an artificial ice-making plant, the building being erected expressly for this purpose, and that the land was assessed at $80,000, the buildings at $187,000 and machinery at $133,000, making a total of $400,000, and that the said machinery assessment of $133,000 included the following items, viz.: "6 boilers, 435 h. p., 2 De La Vergne machines, 800 tons each; 1 De La Vergne machine, 500 tons; 1 Viller machine, 500 tons; 3 dynamos, 150, 100, 50 K. W.; 2 pumps, 5,000,000 gals.; 1 pump, 3,000,000 gal.; piping, cans &c." and "that the capacity of the plant was 750 tons daily at $180." The return of the commissioners in each of these proceedings further alleges that such deputy tax commissioner thereafter reported to the board orally that the assessment was just and equitable and that after duly considering the said application,

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which the board regarded as insufficient to show any and after duly considering the said reports of the overvaluation or error in the assessment of $400,000, deputy tax commissioner, and upon their own knowledge of the character and value of the property, the board concluded that there was no merit in the assertion of the relator that the machinery contained in the building was under section 219-j of the Tax Law personal property and not assessable as real estate or that the assessment was excessive and that the board concluded that the assessment of $400,000 represented no more than the actual value of the land and improvements, including buildings and machinery therein, which was taxable as real estate and not exempt from assessment as personal property under the provisions of section 219-j of the Tax Law and the acts amendatory and supplemental thereto, and that the board therefore confirmed the said assessment at the sum of $400,000 for the year therein mentioned. It will be seen from the foregoing summary of the allegations of the petition and return that the main questions to be determined are whether the machinery and equipment in the ice plant were exempt from taxation under sections 219-j and 219-l of article 9-A of the Tax Law as of October 1, 1917, 1918 and 1919, and that if they were the value thereof, and whether the several total assessments for the years 1918, 1919 and 1920 were correct, irrespective of the method used by the deputy tax commissioner in making the assessments. Before entering upon a discussion of these questions it may be well to pass upon certain objections raised by the respondents which go to the jurisdiction or to the right of the relator to maintain these proceedings. It is urged in the first place by the respondents that the several applications of the relator to them for a review of its assessments failed to

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give what the fair market value of the property was on the several taxable status dates, nor did they give the extent of the over-valuation, and that therefore the relator failed to make out a case showing a ground for relief based upon over-valuation. I am referred by the respondents to *People ex rel. Greenwood* v. *Feitner*, 77 App. Div. 428, as an authority for the position taken. The effect of the decision in that case, however, was overruled in *People ex rel. Edison Electric Illuminating Co.* v. *Feitner*, 86 id. 46; affd., 178 N. Y. 577. Section 37 of the Tax Law simply provides that the complainants "shall file with the assessors a statement, under oath, specifying the respect in which the assessment complained of is incorrect." Section 895 of the Greater New York charter, so far as material, provides: "If such application be made in relation to the assessed valuation of real estate, it must be made in writing, stating the grounds of objection thereto." It would thus appear that neither of the above quoted provisions requires that the market value of the property be stated in the application for revision of the assessment, and that all that is required is a statement of the grounds of the objection. The several applications for revision of the assessments in these proceedings meet with all the above quoted requirements of section 37 of the Tax Law and of section 895 of the charter. The return in each of these proceedings further alleges that the application therein failed to answer any of the questions on the printed form furnished by the commissioners and that such application did not show that the person who signed and swore to it was authorized to make it, or was familiar with the facts, or a real estate expert, or qualified to judge as to the value or the nature of the property, nor did the instrument contain any statement as to what machinery and

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equipment was contained in said buildings, or its value, or the value of the land and buildings exclusive of the machinery, and that the verification was made by the said person as the secretary of the Jacob Ruppert Realty Corporation, stated to be the owner of the premises. Similar objections to the sufficiency of the application were urged in *People ex rel. Empire Mortgage Co.* v. *Cantor*, 190 App. Div. 512, and it was held that the only things necessary to the exercise of jurisdiction by the commissioners of taxes and assessments of the city of New York to hear and determine a complaint in relation to an assessment under section 895 of the Greater New York charter are, that within the time specified in the statute a complaint in writing stating the grounds of the objection be presented to them; that the form of the complaint, the particularity with which the property shall be described or the objections specified, are matters of procedure and do not go to the jurisdiction; that the rule that technical objections to the form or sufficiency of pleadings are waived, if not taken in advance, by proceeding to hear the case upon the merits, applies to proceedings before the tax commissioners to have an assessment revised, and that since the application to revise the assessment was referred to a deputy tax commissioner for the purpose of re-examination and a hearing having been had upon the merits without objection at any time to the form or sufficiency of the application, reassessment could not be denied on the sole ground that the application was insufficient. As already stated the several applications were referred to a deputy tax commissioner for re-examination and a hearing was had on the merits thereof without objection on the part of the respondents, and, therefore, under the rule laid down in the case last cited, whatever objections there

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may have been to the form or sufficiency of the several applications were waived. Another objection raised by the respondents is that the relator has failed to prove that it was aggrieved by the assessment. This point is based upon the fact that the premises under review were in possession of the Arctic Hygeia Ice Company during the years 1917, 1918, 1919 and 1920, and that by the terms of the lease the said Arctic Hygeia Ice Company was obliged to pay, and did pay, the taxes against the said property for the years 1918, 1919 and 1920. Reliance is placed by the respondents upon the language of the following provisions of section 290 of the Tax Law: "Any person assessed upon any assessment roll, claiming to be aggrieved by any assessment for property therein, may present to the supreme court a petition duly verified setting forth that the assessment is illegal, specifying the grounds of the alleged illegality, or if erroneous by reason of overvaluation, stating the extent of such overvaluation, or if inequal in that the assessment has been made at a higher proportionate valuation than the assessment of other property on the same roll by the same officers, specifying the instances in which such inequality exists, and the extent thereof, and stating that he is or will be injured thereby." And they further rely upon the following provisions of section 906 of the Greater New York charter: "A certiorari to review or correct on the merits any final determination of the board of taxes and assessments shall be allowed by the supreme court or any justice thereof, directed to the commissioners of taxes and assessments on the verified petition of the party aggrieved, but only on the grounds which must be specified in such petition, that the assessment is illegal, and giving the particulars of the alleged illegality, * * * or in case of real estate, that

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the same is erroneous by reason of inequality, and that the assessment has been made at a higher proportionate valuation than the assessment of other real estate of like character in the same ward or section, or other real estate on the tax-rolls of the city for the same year, specifying the instance in which such inequality exists, and the extent thereof, and stating that he is or will be injured thereby." In furtherance of points so raised by the respondents the argument is advanced that the relator, the owner of the property, is not the party aggrieved within the purview of section 290 of the Tax Law and section 906 of the Greater New York charter, because its pecuniary interests are not and may not be adversely affected. I do not think the legislature in retaining by the said enactments the statutory remedies heretofore provided for the revision and correction of assessments through a writ of certiorari (Laws of 1880, chap. 269; Gen. Tax Law, Laws of 1896, chap. 908, §§ 250 *et seq.*) intended to exclude from its benefits an owner of property whose tenant, under a lease thereof, paid the taxes levied against the property during his term. No such limited effect as is contended for by the respondents has been given by the courts to the meaning of the phrase "party aggrieved," which was contained in local laws for the revision and correction of assessments. On the contrary, such phrase has been given a much broader meaning in cases arising thereunder. That phrase was defined by the Court of Appeals in *Matter of Walter*, 75 N. Y. 354, 357, as follows: "A person aggrieved, by an act or omission, is one injured thereby. Doubtless the injury sustained need not be a remote and consequential result, but a direct one. The owner of the land affected by the assessment is directly injured thereby, for his property is rendered so much the less valuable to him; it is worth so much

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the less in the market; so much as is the assessment, is taken from his other means, to relieve his land of the assessment; or the land itself is sold or leased by virtue of the lien." In that case a mortgagee was, under the circumstances detailed, held to be a "party aggrieved" and might move to vacate the assessment. Such phrase has also been held to include a former owner of the premises assessed who was bound to indemnify his grantee against the assessment or to remove it as a cloud on the title (*Matter of Phillips*, 60 N. Y. 16); a lessee who is obligated to pay any assessment upon the premises (*Matter of Burke*, 62 id. 224); a person who has become the owner of the property, after the confirmation of an assessment levied against the same and who takes title by the express terms of his conveyance subject to all assessments affecting the property (*Matter of Gantz*, 85 id. 536), and a purchaser of the land assessed after the work had been commenced and before the assessment had been laid and the land was conveyed to him, subject to any assessment to be made for the work, and the payment of the assessment was the principal consideration for the conveyance. *Matter of Pennie*, 108 id. 364. In *Matter of Burke, supra*, it was held that the lessee, as well as the owner, was authorized to institute proceedings to vacate the assessment, the court at page 228 saying: "Either the owner whose title may be clouded by an illegal assessment, or a lessee who is under covenant to pay an assessment, is aggrieved when an invalid assessment is made; for it is on the records seemingly good, and has sooner or later to be met and removed. The provision of law for this special proceeding to vacate was meant to afford an early, speedy and cheap mode of testing the legality. It is open to any one, owner or lessee, who is likely to be put to litigation and expense by reason

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of it." It should be borne in mind that prior to the enactment of chapter 269 of the Laws of 1880, granting the statutory writ of certiorari to review assessments for the purpose of taxation, the common-law writ extended only to the review of assessments void for want of jurisdiction on the part of the taxing officer or in relation to the specific property, or to the review of assessments which were obnoxious to the charge of some other illegality as distinguished from error in judgment whether affecting the question of fact or of law. The office of such a writ was not to revise and modify or set aside assessments on the ground that they were excessive or unequal. *People ex rel. Kendall* v. *Feitner,* 51 App. Div. 196, 199, and citations. To remedy this situation the act of 1880 was passed, which was entitled "An Act to provide for the review and correction of illegal, erroneous or unequal assessments." The court in *People ex rel. Schaeffler* v. *Barker,* 87 Hun, 194, 198, 199; affd., 148 N. Y. 731, speaking of such act, said: "The act was passed to provide a remedy for illegal, erroneous and unequal assessments in whatever form or manner they are levied." And further on: "The statute must be construed so as to suppress the mischief aimed at by its authors, * * *." It was held in that case that the property owner was the party aggrieved and entitled to the writ, even though his property on the assessment roll was assessed under a name other than his own. The act of 1880 not only provided a new statutory writ of certiorari, but also provided for a refund "to the petitioner" for any excess of taxes paid by him as a result of an erroneous assessment. The substance of this act was preserved in the former Tax Law, entitled "An Act in relation to taxation, constituting chapter 24 of the General Laws." Laws of 1896, chap. 908, §§ 250 *et seq.* Section 256 of this

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act provided for the refund "to the petitioner," and this section was amended by chapter 721 of the Laws of 1907 so as to provide that the refund should be made "to the petitioner or other person paying the tax." This language has been preserved in section 296 of the present Tax Law (Consol. Laws, chap. 62). It should be pointed out that the property owner is entitled to the same exemption under section 219-l of the Tax Law as is his tenant. The owner is aggrieved the moment the assessment is made, because the same constitutes a lien upon his property and a cloud upon it. The mere fact that the tenant is obligated to pay the tax does not deprive him of the statutory writ of certiorari. The tenant may never pay it, in which event, of course, the owner must eventually pay, as the tax is *in rem* and a lien upon the property; or, if he pays it, he may not do so prior to the last day on which the writ of certiorari may be obtained. In the event of the payment of the tax by the tenant, if the owner has obtained a writ of certiorari and is successful, the former is entitled to a refund, with interest, pursuant to section 296 of the Tax Law. The payment of the tax, however, is not the only element to be considered in determining whether the owner is aggrieved by the assessment. As pointed out in *Matter of Walter, supra,* the owner of land affected by the assessment is directly injured thereby, because the property is rendered so much less valuable to him, and therefore is worth so much the less in the market. It is common knowledge that intending purchasers of real estate take into consideration the assessed valuation thereof for the purposes of taxation, because the higher it is the greater are the taxes, with the consequent diminution of the net return from the property and a decrease in the fee value as well as the rental value thereof. Under the foregoing

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authorities, as well as upon reason, the relator is clearly a "party aggrieved" by the assessments in question, and it has therefore the undoubted right to maintain these proceedings. We are thus brought to the consideration of the important question whether or not the machinery and equipment was exempt from taxation. The relator contends that the machinery and equipment installed in the buildings in question, with the exception of the boilers, generators and main shafting, were exempt from taxation under section 219-j and section 219-l of article 9-A of the Tax Law and also under the decision in *People ex rel. General Chemical Co.* v. *Cantor*, 105 Misc. Rep. 62; affd., 188 App. Div. 959; 228 N. Y. 506, and that hence the value of the same was improperly included in the several assessments. Article 9-A of the Tax Law above mentioned is commonly known as the "Emerson Act" or the "New York State Income Tax Law." It was added by chapter 726 of the Laws of 1917 and substitutes a new system for the taxation of manufacturing and mercantile corporations and provides that thereafter such corporations shall not be subject to assessment or taxation on their personal property which the act defines (*People ex rel. General Chemical Co.* v. *Cantor, supra*) and radically changes the method of determining the annual franchise tax of such corporations. *People ex rel. Iroquois Door Co.* v. *Knapp*, 186 App. Div. 172. It imposes a tax at the rate of three per cent of the net income of such corporations, payable in advance, to be computed upon the basis of their net income for their fiscal or calendar year next preceding, which income is presumably the same upon which said corporations were required to pay federal taxes (§§ 209, 219), and provided further that one-third of said franchise tax should be distributed by the state treasurer to the treasurers of the several counties of

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the state and disposed of by them as provided in section 219-h of the Tax Law. Section 219-j of article 9-A of the Tax Law, as contained in said chapter 726 of the Laws of 1917, among other things provided that "After this article takes effect manufacturing and mercantile corporations shall not be assessed on any personal property which for the purpose of this exemption shall include such machinery and equipment affixed to the building as would not pass from grantor to grantee as a part of the premises if not specifically mentioned or referred to in the deed, or as would, if the building were vacated or sold, or the nature of the work carried on therein changed, be moved, except boilers, ventilating apparatus, elevators, gas, electric and water-power generating apparatus and shafting." The meaning of the foregoing provision was passed upon in *People ex rel. General Chemical Co.* v. *Cantor, supra.* In that proceeding the relator, a manufacturing corporation, sought to review an assessment for the year 1918 on real property owned by it and to correct the assessment because there was erroneously included therein the value of machinery and equipment. It was conceded that all the machinery and equipment could be detached and removed without material injury to the building, and it was held that the relator's motion to reduce the assessment should be granted as prayed for. Mr. Justice Delehanty in the course of his opinion said: " Prior to the passage of the Emerson Act, ' real estate ' for the purpose of taxation was defined by subdivision 6, section 2 of the Tax Law as ' the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon under or above, or affixed to the same,' and under the decisions of this state it has been held that pursuant to said section quoted, machinery installed in a build-

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ing and affixed to the realty is taxable as real estate. *People ex rel. N. Y. Edison Co.* v. *Wells,* 135 App. Div. 644, and cases there cited. But the situation in this respect is now changed. The legislature by the Emerson Act has defined what shall constitute 'personal property' for the purpose of taxation of mercantile and manufacturing corporations and has made such exempt from local taxation. The language used in the statute is in nowise uncertain or doubtful of meaning, and in my opinion the plain intent thereof was to exempt from personal tax such machinery and equipment affixed to the building as could be removed therefrom without material injury thereto, except, of course, boilers, etc., expressly precluded." The substance of the provisions as contained in section 219-j of chapter 726 of the Laws of 1917 were by the Laws of 1918, chapter 271, section 3, in effect April 19, 1918, retained in a new section known as section 219-l, which, with the amendments and additions made thereto, reads as follows: "Section 219-l. Personal property defined. The term 'personal property,' for the purposes of the exemption from assessment and taxation thereon locally as granted by section two hundred and nineteen-j of this chapter, shall include such machinery and equipment affixed to the building as would not pass between grantor and grantee as a part of the premises if not specifically mentioned or referred to in the deed, or as would, if the building were vacated or sold, or the nature of the work carried on therein changed, be moved, except boilers, ventilating apparatus, elevators, gas, electric and water power generating apparatus and shafting. An owner of a building is entitled to the same exemption under this section as a lessee and every assessment of real property made subsequent to June fourth, nineteen hundred and seventeen, shall be subject to the provisions

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of this section as amended hereby." It will be observed that a new provision was added by this amendment, by the terms of which the owner is entitled to the same exemption as a lessee. Section 219-l was amended by the Laws of 1919, chapter 628, section 14, in effect May 14, 1919, so as to read as follows: "Section 219-l. Personal property defined. The term 'personal property,' for the purposes of the exemption from assessment and taxation thereon locally as granted by section two hundred and nineteen-j of this chapter, shall include any movable machinery and equipment used for trade or manufacture and not essential for the support of the building, structure or superstructure, and removable without material injury thereto. The term 'personal property' as used in such section, shall not include boilers, ventilating apparatus, elevators, plumbing, heating, lighting and power-generating apparatus, shafting other than counter-shafting, equipment for the distribution of heat, light, power, gases and liquids, nor any equipment consisting of structures or erections to the operation of which machinery is not essential. An owner of a building is entitled to the same exemption under this section as a lessee." Upon comparing the foregoing provisions with those contained in the Laws of 1918, chapter 272, section 3, it will be seen that while certain clauses have been omitted and others have been substituted, the provisions of the amended section granting exemption from taxation to such movable machinery and equipment as could be removed without material injury to the building are declaratory of the rule laid down in *People ex rel. General Chemical Co.* v. *Cantor, supra,* upon that subject. It should, perhaps, be observed in this connection that by adding the words "not essential for the support of the building, structure or superstruc-

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ture" the legislature intended to remove whatever doubt there might still be with respect to the manner of the affixation of the machinery and equipment installed therein for trade or manufacture in order to entitle the applicant to the exemption provided by the said section, whenever such machinery and equipment could be removed without injury to the building. It must also be borne in mind that the amended section omits the following language contained in the one as it stood at the time of such amendment, viz.: "Or as would, if the building were vacated or sold, or the nature of the work carried on therein changed, be moved." The deputy tax commissioner testified that he included in the building assessment the value of the elevator and of the smokestack, and that with the exception of certain items of machinery, which he separately valued at $133,000, every other item in the building was included in the building assessment. Such proof was competent (*People ex rel. Knickerbocker Co.* v. *Wells*, 99 App. Div. 455, 457–459), and it conclusively shows that the claim of the respondents that such elevator and smokestack have not been assessed is clearly untenable. The report of the deputy tax commissioner which, as already stated, forms part of the return of the commissioners in each of these proceedings, shows that the machinery assessment includes six boilers and certain other kinds of machinery. The relator concedes that two boilers, three generators and shafting are taxable, and hence it will not be necessary to determine whether or not they could have been removed without material injury to the buildings. With these exceptions the relator insists that all other machinery and equipment included in the machinery assessment were removable without material injury to the buildings. There is no question but that such other machinery and equipment

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were used for trade or manufacture during the years in question, and I shall therefore proceed to inquire if they were removable without material injury to the buildings. It appears from the evidence that the machinery, apparatus and equipment in the buildings in question were installed therein after the buildings had been completed; that such machinery, apparatus and equipment were brought into the buildings in question in separate parts, which parts were assembled on the floors of the buildings on which the same were located and could be dismantled and carried out of the buildings through the doors thereof in the same manner in which they were brought in; that the floors of said buildings consisted of concrete, and all of the machinery, apparatus and equipment was brought into the building and assembled and set upon these concrete floors, some of them being stabilized by means of bolts and some of them resting on said floors without any fastenings whatsoever. So far as concerns the issues relating to the removability of the machinery and equipment claimed to be exempt from taxation, I have, after a careful consideration and analysis of the evidence, reached the conclusion that they should all be decided in favor of the relator. I am therefore of the opinion that the relator has by a preponderance of the evidence overcome the presumption that the machinery and equipment in question could not be removed without material injury to the buildings, and I accordingly find that all such machinery and equipment, with the exception of the boilers, generators and main shafting, were removable without material injury to the buildings, structures or superstructures, and that the same were not essential for the support of the said buildings, structures or superstructures. If I am right in this conclusion, then it necessarily follows that all the machinery and equip-

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ment included in the machinery assessment, with the exception of the boilers, generators and main shafting, were personal property and not assessable as real estate, and therefore exempt from local taxation during the years in question. The relator makes the point that only two of the six boilers used for the purpose of operating the ice plant are taxable, because, as claimed, that is the maximum number which would be required to operate machinery in an ordinary building of the same size as the relator's building. This contention is based upon the following language of section 219-l of the Tax Law as it stood when it was amended in 1919, viz.: "Or as would if the building were vacated or sold, or the nature of the work carried on therein changed, be moved." As already stated, this provision was omitted from the section in question in its amended form, and the provision so omitted would therefore, even if it were held that the relator came within the same, only apply to the taxes for 1918 and 1919. The provision above quoted was passed upon in *People ex rel. General Chemical Co.* v. *Cantor, supra,* and it was held that the same rule of construction applied to the preceding clause was applicable to the one under review, and that therefore, if the machinery and equipment were permanently affixed to the building it would be properly taxable as real estate, whether or not the building were vacated or sold, or the nature of the work carried on therein changed. It is true that the point so raised by the relator in these proceedings was not considered by the court in that case, but it is plain from a reading of the provision so quoted in connection with the one preceding it, in the light of the decision in the *General Chemical Company* case, that its purpose was to include within the definition of the term "personal property" for the purpose of the exemption such

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removable machinery and equipment as could be moved if the buildings were vacated or sold, or the nature of the work carried on therein changed; in other words, that the machinery and equipment should under such circumstances retain its character as personal property. It cannot, however, by any necessary or fair construction, be fairly inferred that the legislature intended by such provision to provide that machinery and equipment coming within the exception to the exemption provided should nevertheless be regarded as personal property, or to place any limitation for the purposes of taxation upon the number of articles of machinery not exempt from taxation merely because a smaller number would ordinarily be required in a building of the same size if a different kind of work were carried on therein. Under the provisions of section 219-l of the Tax Law boilers are expressly exempted from the exemption therein provided. Within the purview of the Tax Law they are an integral part of the building, and as long as they remain therein and are used they are assessable as real estate. Having thus reached the conclusion that all six boilers were taxable, the next question is what was the actual market value on the taxable status dates of such boilers, as well as of the three generators, main shafting and pulleys, which, as seen, the relator concedes were taxable. After considering all the evidence I find that the actual market value of those items of machinery on the first day of October, 1917, 1918, and 1919, was as follows: Six boilers, $26,415; three generators, $9,100; main shafting and pulleys, $590, amounting altogether to the sum of $36,105, which is to be deducted from such sum as I shall find was the actual market value of the machinery and equipment included in the machinery assessment as of the several taxable status dates and added

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to the building assessment. As shown above, all the machinery and equipment included in the machinery assessment, with the exception of six boilers, three generators, main shafting and pulleys, were exempt from taxation. The entire machinery assessment, however, includes the said boilers, generators, main shafting and pulleys, and the entire machinery and equipment, including these items of taxable property, was assessed at $133,000. After considering all the facts I am of the opinion that the sum last mentioned was the full or actual value of all such machinery and equipment on the several taxable status dates, from which sum, however, there should be deducted the sum of $36,105, which, as above stated, I have found was the actual market value of all the machinery not exempt from taxation on such dates. Deducting the last mentioned sum from the said sum of $133,000 leaves the sum of $96,895, the aggregate value of all the exempt machinery and equipment. Both parties introduced evidence relative to the value of the land and buildings, and therefore it cannot be assumed, even if the provisions of the charter apply here, that the assessment is erroneous to the extent of the difference between the actual market value of the lands and buildings and the full or actual value of the exempt machinery and equipment. See *People ex rel. Gleason* v. *Purdy,* 223 N. Y. 88, 92. A certiorari proceeding under the Tax Law is very much like a revaluation of the property which is the subject of assessment. *People ex rel. Jamaica W. S. Co.* v. *Tax Commissioners,* 196 N. Y. 39, 50. The total assessment can only be reviewed (*People ex rel. Gleason* v. *Purdy, supra,* 92, and citations), and consequently actual market value of the land unimproved and the land with improvements thereon, exclusive, of course, of the value of the exempt machinery and equipment,

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must also be taken into consideration in determining whether or not there has been an overvaluation of the property. The respondents insist, however, that the market value of the land with improvements, exclusive of the exempt machinery and equipment, during the years in question exceeded the sum of $400,000, the total assessment imposed. The relator, on the other hand, maintains that the value of the land and improvements was no more than that placed upon it by the deputy tax commissioner when he valued the land at $80,000 and the buildings at $187,000, amounting in the aggregate to $267,000. Under the Consolidation Act (Laws of 1882, chap. 410, § 814) real property was required to be assessed at the sum for which it "under ordinary circumstances would sell." That section, so far as material, provided as follows: "It shall be the duty of the deputy tax commissioners, under the direction of the commissioners of taxes and assessments, to assess all the taxable property in the several districts that may be assigned to them for that purpose by said commissioners, and they shall furnish to them, under oath, a detailed statement of all such property showing that said deputies have personally examined each and every house, building, lot, pier, or other assessable property, giving the street and ward map number of such real estate embraced within said districts, together with the name of the owner or occupant, if known; also, in their judgment, the sum for which such property under ordinary circumstances would sell, with such other information in detail relative to personal property or otherwise as the said commissioners may, from time to time, require." The Court of Appeals in *People ex rel. Manhattan Railway Co.* v. *Barker*, 146 N. Y. 304, construing the foregoing provisions, at pages 312, 313, said: "And under the Consolidation Act for the

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City of New York it shall be assessed 'at the sum for which such property under ordinary circumstances would sell.' The value of property is determined by what it can be bought and sold for, and there can be no doubt but that these various expressions used in the statute all are intended to mean the *actual value* of the property." The foregoing provisions were retained in section 889 of the Greater New York charter (Laws of 1897, chap. 378). Such section, however, was amended by chapter 466 of the Laws of 1901, and again by chapter 454 of the Laws of 1903. By the act of 1903 section 889 was amended so as to read as follows: "It shall be the duty of the several deputy tax commissioners, under the direction of the board of taxes and assessments, to assess all the taxable property in the several districts that may be assigned to them for that purpose by said board, and they shall furnish to the said board, under oath, a detailed statement of all such property, showing that said deputies have personally examined each and every house, building, lot, pier or other assessable property, giving the street, lot, ward, town and map number of such real estate embraced within said district, together with the name of the owner or occupant, if known; also the sum for which, in their judgment, each separately assessed parcel under ordinary circumstances would sell if it were wholly unimproved; and separately state the sum for which, under ordinary circumstances, the same parcel of real estate would sell with the improvements, if any, thereon; with such other information in detail relative to personal property or otherwise as the said board may, from time to time, require. * * *" The provisions last above quoted were passed upon in *People ex rel. Poor* v. *Wells,* 139 App. Div. 83, where the court, speaking through Mr. Justice Dowling, at page

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87, said: "By section 889 of the Greater New York charter (Laws of 1901, chap. 466, as amd. by Laws of 1903, chap. 454) it is made the duty of the deputy tax commissioners, in arriving at their conclusions as to the assessable value of taxable property, to state under oath to the board the sum for which, in their judgment, each separately assessed parcel of real estate under ordinary circumstances would sell if it were wholly unimproved. Under this provision it is the duty of commissioners of taxes and assessments to assess this property year by year at its actual market value, no more, no less. (*People ex rel. Manhattan R. Co.* v. *Barker,* 146 N. Y. 304, 312.)" That case was affirmed by the Court of Appeals on the opinion of Dowling, J., below (200 N. Y. 518), and the rule there laid down as to assessing the property at its market value was applied in *Tax Lien Co.* v. *Schultze,* 213 N. Y. 9, 11. From the authority of these cases it follows that the value of the real property involved in these proceedings must be determined by its actual market value — that is, the amount for which it would sell under ordinary circumstances during the years in question. Applying such rule of valuation to the real estate in suit, and without discussing in detail the evidence relative to the value of the land and buildings, it is sufficient to say that I find that on the several taxable status dates the actual market value of the land was the sum of $80,000, and the actual market value of the buildings was $187,000, to which should be added the sum of $36,105, the aggregate actual market value of the said six boilers, three generators, main shafting and pulleys, as found by me, and amounting in the aggregate to the sum of $303,105. From what has preceded it is clear that there has been an overvaluation in each of the years in question to the extent of $96,895, which is the difference

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between $400,000, the total amount of the assessment, and the sum of $303,105, which I have found was the actual market value of the land with improvements thereon on the several taxable status dates. In view of the evidence I am strongly of the opinion that the relator has sustained the burden of showing affirmatively by a preponderance of the evidence that the total assessment for each of the years in question was erroneous by reason of overvaluation; that it has overcome the presumption of the correctness of the several assessments; that it has fully established all of the prerequisites necessary for a correction thereof, and that hence its claim for a reduction of the same is well founded. My conclusion is that the several assessments levied by the respondents against the said real property for the years 1918, 1919 and 1920 of $400,000 are erroneous by reason of overvaluation to the extent of $96,895, and that such several assessments should be reduced to the sum of $303,105. The respective parties may submit requests for findings within five days after the publication hereof. All papers received by me, including the stenographer's minutes, exhibits, briefs and filed papers, have been returned to the clerk, to whom such requests to find should be handed in, with proof of service.

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MANUEL JOSEPH BRAZILL, Plaintiff, *v.* MARGARET WEED and FREDERICK A. SOUTHWORTH, Individually and as Executors of and Trustees under the Last Will and Testament of THOMAS M. WEED, Deceased; LILA MORRISON WEED; MARGARET THOMAS WEED; and ELIZABETH CLARK, as Administratrix of the Goods, Chattels and Credits that were of THOMAS M. WEED, Deceased, Defendants.

(Supreme Court, New York Special Term, May, 1921.)

Real property — who is not a bona fide purchaser for value without notice — wills — vacating probate — posthumous child — damages.

After the executors under the will of a testator who died survived by his widow, an infant daughter and an unborn child, had conveyed certain real estate of their testator, the surrogate, upon vacating and setting aside the decree of probate on the ground that the daughter had not been legally represented by special guardian and that the posthumous child was not bound by said decree, opened the probate proceeding with leave to the daughter to file objections. No steps having been taken to reprobate the will, letters of administration were duly issued. In an action to remove an alleged cloud upon the title of the premises it appeared that, prior to taking title, plaintiff saw the posthumous child but claimed that he closed the transaction, throughout which he was not represented by an attorney, upon the assurance of the executors that they would reprobate the will, which claim was supported by the testimony of one of the executors, the lawyer who drew the will. *Held*, that in the circumstances plaintiff was not a *bona fide* purchaser for value without notice.

That in the absence of proof of the existence of a valid will at the time of the conveyance, of which plaintiff made no offer of proof, he was only entitled to a return of the consideration paid by him, the cancellation of the bond and mortgage given in part payment of the purchase price, and $100 for liquidated damages, besides any sum paid by him for taxes on the property, as well as installments paid on account of the principal

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of the mortgage and interest payments, together with interest on said several amounts less the rental value of the property — seventy-five dollars per month — during the time of his occupancy.

That the sums so payable to plaintiff be decreed to be liens upon the property in question, and that it may be sold to pay the same.

ACTION to remove cloud on title.

Harold Swain (Edwin W. Cady, of counsel), for plaintiff.

Gustav Lange, Jr., for defendants Lila M. Weed, Margaret T. Weed and Elizabeth Clark.

William R. Brinckerhoff, for defendant Frederick A. Southworth.

LYDON, J. This action was brought to remove an alleged cloud upon title, involving the premises No. 464 West One Hundred and Forty-fifth street, in the borough of Manhattan, city of New York. Plaintiff claims ownership thereof by purchase from the defendants Margaret Weed and Frederick A. Southworth, as alleged executors of and trustees under the alleged last will and testament of Thomas M. Weed, deceased. The infant defendants Lila Morrison Weed and Margaret Thomas Weed claim ownership thereof as children and heirs at law of said Thomas M. Weed, deceased. The action was commenced after an action in ejectment had been instituted on behalf of said infant defendants against the plaintiff. After issue was joined in the present action, an order was entered directing a separate trial of the equitable issues prior to the trial of the issues of law raised by the counterclaim of the infant defendants, to wit, ejectment. The testimony shows that Thomas M. Weed, who was a

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practicing dentist, died on January 28, 1918, leaving him surviving his widow, Margaret Weed, and a daughter, Lila Morrison Weed, who was born February 5, 1916, and an unborn child who was born on September 11, 1918, and was named Margaret Thomas Weed. Said decedent also left him surviving his mother, Eliza P. Weed. On November 3, 1915, Dr. Weed made his last will and testament at the office of his attorney, Frederick A. Southworth. The will was left in the possession of Mr. Southworth, but a copy thereof was sent to Dr. Weed on or about November 11, 1915. This copy, after Dr. Weed's death, was found in a safe in the doctor's office. On this copy was written in Dr. Weed's handwriting the words "Copy of Will, November, 1915. Original F. A. Southworth, 68 William St." The original will was retained in Mr. Southworth's office until the last of July, 1917, when said original will was sent to Dr. Weed. Dr. Weed died January 28, 1918. On February second, two days after the funeral, the widow Margaret Weed, decedent's mother, Eliza P. Weed, his sister, Margorie Ean, and her husband, Alfred Ean, made a search for the combination of the safe in Dr. Weed's office, and while so doing, the will was found by Margaret Weed, the widow, who produced it from the drawer of the desk. Mr. Southworth arrived a few minutes later. The will as found was mutilated in that the last page had been torn, so that the instrument bore no signature of the testator, no attestation clause and no signatures of any witnesses. After numerous conferences between the members of the family and Mr. Southworth and numerous counsel it was decided to offer the said mutilated will for probate. Thereupon, and on or about March 19, 1918, the widow, Margaret Weed, together with Mr. Southworth, executed a petition for the probate of said will

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and filed the same in the Surrogates' Court, New York county. On said probate the infant, Lila Morrison Weed, was cited. In the petition it was alleged, among other things, as follows: "Your petitioners have been informed and verily believe that during the lifetime of said testator he mutilated a part or portion of the paper upon which his last will and testament, herein sought to be probated, was written. That said mutilation was not the act of the said testator while he was of sound and disposing mind, but was committed at a time and under circumstances which your petitioners are informed and believe rendered said act null and void at law by reason of the mental incapacity of the said testator at the time when said mutilation occurred." The unborn child was also specifically mentioned in said petition. Necessarily, no citation was or could be served upon the unborn child. As to the infant Lila Morrison Weed, Warren Leslie purported to appear for her as special guardian on the hearing for the probate on April 5, 1918, but he had not been appointed special guardian at that time, his appointment having been made subsequently and on May 6, 1918. The report which was filed by said Warren Leslie, as such special guardian, was not verified by him and he does not certify therein that he examined the testimony of the witnesses except the testimony of the subscribing witnesses. Thereafter and on the 5th day of June, 1918, a decree was made by Surrogate Fowler admitting to probate the aforesaid paper writing, with the missing parts supplied, as the last will and testament of the said Thomas M. Weed, deceased, valid to pass real and personal property, and directing that letters testamentary issue to the executrix and executor named therein, who may qualify thereunder. Obviously the probate of this will was not binding on the unborn child. Prior to

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the probate of the will it appears that the widow, Margaret Weed, caused an advertisement to be inserted in a dental publication on March 18, 1918, offering for sale the premises in question, together with the dental practice of Dr. Weed. In response to this advertisement a real estate broker, G. Walker Campbell, negotiated for the purchase of the property, as advertised, for a client who, in fact, was the plaintiff, but whose identity was not then revealed. Finally, on August 20, 1918, the executors entered into a written contract with the plaintiff for the sale of the premises, including the dental equipment, for the sum of $11,875, to be paid as follows: $1,000 on the signing of the contract, $2,875 in cash on the delivery of the deed and $8,000 by the purchaser giving back a purchase money mortgage for that amount on the premises, which was to run for a period of three years, with interest at five per cent per annum, payable semi-annually, and to contain a provision for the payment of semi-annual installments of $250 on account of the principal until the mortgage debt was reduced to $7,000. The contract likewise provided: "It is further understood and agreed that in case the vendors are unable to complete this contract and to deliver to the vendee or his assigns a marketable title to the premises herein described they shall be released from all liability upon vendors' return to the vendee the sum of one thousand dollars ($1,000) paid on the signing of this contract, together with counsel fees and title insurance expenses not to exceed one hundred dollars ($100), same to be paid as liquidated damages." Title was passed and the deed delivered to plaintiff under this contract on October 28, 1918, and he paid the money and duly executed and delivered the bond and mortgage as called for by the contract. The plaintiff claims that he closed the

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transaction upon the assurance of the defendants Margaret Weed and Frederick A. Southworth that they would thereafter reprobate the said will of Thomas M. Weed, deceased, as to the posthumous child, and in this assertion he is supported by the testimony of Frederick A. Southworth. The plaintiff throughout the transaction was not represented by an attorney and apparently absolutely relied upon the good faith of the parties he was dealing with. He purchased this property from the trustees under a will which purported to have received the sanction of the probate court. But at the same time he knew of the posthumous child before her birth, and then he knew of the birth of the child on September 11, 1918, and actually saw her prior to taking title. Notwithstanding the fact that he was then in a position to require the reprobate of the will, which if duly reprobated would have perfected his title, he made no such demand. He merely relied upon the promises of the trustees to reprobate the will at some future time. After the closing of title the defendant Margaret Weed changed her residence to Massachusetts, and shortly thereafter on December 5, 1918, the defendant Mr. Southworth wrote her inclosing a petition for the reprobate of the will and requesting her to execute same and return it to him. To this letter she subsequently replied by refusing through her new attorney to sign, and Mr. Southworth was requested not to take any steps in the matter. No steps were thereafter taken by any one to reprobate the said alleged will, and thereafter no final adjudication on the merits as to the validity of said alleged last will and testament of said Thomas M. Weed, deceased, has been had. Subsequently, and on or about February 3, 1919, separate applications were made on behalf of the widow and each of the children of said Thomas M. Weed, deceased, for orders vacating the said decree

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of June 5, 1918, admitting said alleged will to probate. Surrogate Fowler, who had formerly granted the decree of probate, heard the application and wrote an opinion holding that the infant Lila Morrison Weed was not legally represented by a special guardian at the time of the application for probate, and as to the posthumous child she was not bound by the probate of the will, and thereupon made an order vacating and setting aside the probate and revoking the letters testamentary granted to Margaret Weed and Frederick A. Southworth, and opening the proceedings for the probate, with permission to the said Lila Morrison Weed to file objections to said petition for said probate. Apparently no steps were taken thereafter to probate the will, but on July 12, 1919, on a petition duly filed in the Surrogates' Court, letters of administration were duly issued to the defendant Elizabeth Clark as administratrix of the goods, chattels and credits which were of the said Thomas M. Weed, deceased, and said Elizabeth Clark duly qualified and is acting as such administratrix, and she now has possession of the personal estate of said decedent other than the amounts of money paid to defendant Southworth by the plaintiff on the purchase of the premises in question and the bond and mortgage. Thus we find that Thomas M. Weed has been declared to have died intestate, and the probate of the alleged will under which the defendants Margaret Weed and Frederick Southworth purported as trustees to sell the premises in question has been set aside. Notwithstanding the revocation of the probate by the surrogate, the plaintiff's claim could be sustained if a valid will has been proven giving power to these trustees to make this conveyance. The plaintiff has offered no proof in this action as to the validity of the will other than to put in evidence the records of the Surrogates'

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Court, and he claims that the revocation of the letters testamentary can have no effect upon the validity of the acts of the executors in this conveyance to him of the real property in question under the power of sale in the will. In this contention he relies on section 2555 of the Code of Civil Procedure, which provides in part as follows: "The revocation does not affect the validity of any act, within the powers conferred by law upon an executor, administrator, or guardian, done by him before the service of the citation, where the other party acted in good faith; * * *." The plaintiff, however, does not seem to be in the position of a person who may be said to have acted in good faith, for he had knowledge, both actual and constructive, of the defect in the title, and relied upon the promises of the executors to reprobate the will. With that knowledge he deliberately took title and paid over his money and obligated himself on the bond and mortgage without first insisting on the reprobate proceeding, as the posthumous child had prior to that time been born. He certainly was not, therefore, a *bona fide* purchaser for value without notice. *Williamson* v. *Brown,* 15 N. Y. 354; *Sweet* v. *Henry,* 175 id. 268. In *Williamson* v. *Brown, supra,* it was held (at p. 362): "Where a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a *bona fide* purchaser." On the trial it was shown that the will when found was in a mutilated condition, and that as a mutilated will it was offered for probate, and that thereafter it was admitted to probate and letters testamentary were issued to the defendants Margaret Weed and

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Frederick A. Southworth as executors, but there was no proof offered to show the means or circumstances under which the mutilation occurred. There is an allegation in the petition for probate to the effect that the decedent mutilated the will while he was not of sound and disposing mind and that said act was therefore void. But there is no evidence in this case to show that proof of any such facts was produced before the surrogate, and no proof of that kind was offered on the trial of this action. It would follow, therefore, that there is a presumption that the mutilation was done by the decedent *animo revocandi. Matter of Hopkins,* 172 N. Y. 360. The burden of proof was on the plaintiff to establish that the alleged will relied upon by him was the valid last will and testament of the decedent and that it had not been revoked, but that it was still in existence at the time of decedent's death. There was considerable testimony offered on the trial to show that the desk in which the mutilated will had been found was in the decedent's office and that numerous people had access to the office; furthermore, that "within thirty seconds" after the death of decedent the widow, Margaret Weed, "dashed" downstairs to the office; also that the widow stated to her mother-in-law "that she had to laugh to herself when she talked to Fred (meaning Mr. Southworth); that Fred hung around thinking he was going to get a good fee for being executor of Tom's will and there was no will." Presumably this evidence was offered to indicate that the widow had something to do with the mutilation of the will, but it is sufficient to point out that the same witnesses testified that on February 2, 1918, a few days after, when the will was found, the widow told Mr. Southworth that she wanted the will probated if possible. Therefore no proof whatever has been offered as to the mutilation of the will

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by any specific person, and as the will was found in the decedent's desk in a folder of the Bankers Trust Company containing suggestions as to the making of wills every presumption points to the fact that the will was mutilated and therefore revoked by the decedent. As to the allegation in the petition on probate that the decedent mutilated the will while insane, that does not square with the testimony of the plaintiff's witnesses on the trial, which showed that the decedent was in full possession of his mental faculties down to the time of his last illness; that on his return from the hospital in the early part of January, 1918, he paid for the taxi, and thereafter, in discussing the photographs which had been taken of his daughter, he wrote out a list of names of persons to whom he desired copies to be given; that he also discussed with his broker different stocks and expressed his opinions on the investments. What evidence, if any, was offered in the Surrogates' Court on which the decree of probate was granted is not revealed by the testimony in this case, but the decree was set aside by the surrogate, first, because the infant, Lila Morrison Weed, was not legally represented, and, secondly, because of the lack of jurisdiction as to the unborn child. That was followed by the issuance to Elizabeth Clark of letters of administration, which would seem to establish that the decedent died intestate. In the contract of sale entered into by the plaintiff and the executors there was a clause providing for the return to the plaintiff of the first payment and also $100 additional as liquidated damages in the event that the executors were unable to complete the contract and to deliver to the plaintiff or his assigns a marketable title, and upon such payments the executors were to be released from all liability. It is true that the executors did

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deliver a deed under the contract, but at that time the same defects of title existed as were present at the time that the contract of sale was made. There can be no presumption of intention on the part of the executors to give up the beneficial provisions in the contract releasing them from liability if they failed to convey a marketable title in the absence of evidence of that intention. *Morris* v. *Whitcher,* 20 N. Y. 41. The rule is certainly not invariable that the executed agreement merged in it all the covenants of the preceding executory contract. It depends upon the intentions of the parties, and if there is nothing to show it was the design to surrender or extinguish the preceding covenants the presumption is they will remain in force. *Dickinson* v. *Vance,* 31 App. Div. 464; *Brunswick Const. Co.* v. *Burden,* 116 id. 468. At the close of the trial counsel for the defendants other than the defendant Southworth moved to dismiss the complaint on numerous grounds, and counsel for defendant Southworth joined in the same. During the trial the counsel for the defendants other than the defendant Southworth consented to the return to plaintiff of all moneys paid out by him for the purchase of the premises in question, as well as cancellation of the bond and mortgage, and the defendant Southworth testified that he had no objection to doing likewise. It would seem, therefore, that in the absence of proof of the existence of a valid will at the time of the conveyance that the plaintiff is only entitled to the return of the consideration paid by him, the cancellation of the bond and mortgage executed by him and $100 for liquidated damages, besides any sums paid by him for taxes on the property, as well as installments paid on account of the principal of the mortgage, and interest payments, together with interest on said several amounts, less the rental

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value of the property during the time of his occupancy. Said rental value is fixed at seventy-five dollars per month, with interest. That said sums so payable to the plaintiff shall be decreed to be liens upon the real property in question, and that said real property may be sold to pay the same.

Ordered accordingly.

EDWARD COYKENDALL, Plaintiff, *v.* THE CITY OF KINGSTON, PALMER CANFIELD, JR., as Mayor, et al., Defendants.

(Supreme Court, Ulster Trial Term, June, 1921.)

Injunctions — when dependent upon statute in force when relief awarded — statutes, construction of — grade crossings, elimination of — limitation of cost to city — Railroad Law, § 95-a, added by Laws of 1921, chap. 663 — General Municipal Law, § 51.

The rights of the plaintiff in a suit asking for injunctive relief, when dependent upon statute, are to be determined with reference to the statute in force at the time when the relief, if any, is to be awarded.

In a proceeding instituted in 1917, by the city of Kingston, N. Y., before the public service commission for the elimination of a grade crossing in said city, an order was made on April 1, 1920, which after directing that the cost of construction of sidewalks, etc., provided for, the cost of relocating or reconstructing sewers and water mains and the costs of and incidental to the acquisition of additional land or resulting from consequential damages, in excess of $125,000, should be borne solely by the city, recited that it, said order, was granted upon the distinct understanding that the cost of construction, acquisition of land, etc., was not to be construed as part of the elimination or be in any way chargeable to the elimination account or paid for out of funds appropriated by the legislature for the abolition of grade crossings, and that the city's acceptance of the order should be deemed an undertaking on its part to fulfill the obligations imposed upon it by said

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order. Immediately after the approval by the mayor of a resolution of the common council and before chapter 663 of the Laws of 1921 became a law, plaintiff, a qualified taxpayer of the city, commenced this action under section 51 of the General Municipal Law to enjoin the carrying out of the agreement imposed by the order of the public service commission and to annul said agreement and have it declared illegal in so far as thereby the city was required to pay more than twenty-five per cent of the expense of the elimination. Chapter 663 of the Laws of 1921 became a law on May 7, 1921, and amended chapter 481 of the Laws of 1910 (Cons. Laws, chap. 49) by the insertion therein of section 95-a of the Railroad Law. *Held*, that the well settled rule of construction that if there be any inconsistency between the older and later provisions of a statute, the earlier must give way, applied, and that under the statute of 1921, which was in effect when the decision herein was made, the costs of construction of the sidewalks, pavements, sewers and guard-rails and the cost of relocating or reconstructing existing sewer and water mains, and the costs of and incidental to the acquisition of additional land, or resulting from consequential damages, in excess of $125,000 which by the provisions of the order of the public service commission were to be borne solely by the city, are elements of the costs of eliminating said grade crossing to be added to the other expenses of the elimination, together with all contributions made by the steam surface lines including the thirty-one foot strip of land, but not including the expenses of the trolley lines set forth in said order; and that the city's share of said expense to be apportioned by the public service commission, shall in no event exceed fifty per cent of the entire expenses of such elimination.

An injunction granted restraining the defendants from paying more than fifty per cent of the expenses of the elimination of such grade crossing, such items of expense to be made up as indicated in this opinion.

ACTION for an injunction.

A. T. Clearwater, for plaintiff.

Wm. D. Brinnier, corporation counsel, for defendants

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NICHOLS, J. On or about February 13, 1917, the mayor and common council of the city of Kingston filed with the public service commission, second district, a petition based on the Railroad Law, alleging that the Broadway grade crossing in said city where the street Broadway crosses the tracks of the West Shore railroad and the Walkill Valley railroad is dangerous and asked for an elimination of said grade crossing. Such proceedings were had by the public service commission that on the 1st day of April, 1920, the commission made an order that the Broadway grade crossing aforesaid be eliminated and that the street be carried under the said steam railroad lines.

The said order of the public service commission contained a clause (subd. 2), which provides:

"2. That the cost of construction of sidewalks, pavements, sewers and guard-rails herein provided for, the cost of re-locating or reconstructing existing sewers and water mains, and the costs of and incidental to the acquisition of additional land or resulting from consequential damages hereafter determined or assessed which shall be in excess of $125,000, shall be borne solely by the City of Kingston."

Said order also contained the further clauses (subds. 4, 5), as follows:

"4. That this order is granted upon the distinct understanding that the costs of construction, acquisition of land, etc., as enumerated in paragraphs 2 and 3 thereof, are not to be construed as part of the elimination, and are not to be in any way charged against the elimination account or paid for out of funds appropriated by the Legislature of the State of New York for the purpose of eliminating grade crossings.

"5. That the acceptance of this order by the City

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of Kingston shall be deemed an undertaking on its part to fulfill the obligations imposed by clause 2 of this order."

On April 16, 1920, Alderman Charles A. Warren offered the following resolution which was adopted by the common council of the city of Kingston:

"*Resolved,* that the order made by the Public Service Commission, Second District, dated April 1st, 1920, providing for the elimination of the West Shore Railroad Grade Crossing at Broadway, be and hereby is, in all respects, accepted."

This resolution was transmitted to the mayor April 7, 1920, and approved by him on that day. Thereupon the plaintiff, who is a qualified taxpayer of the city of Kingston assessed for more than $5,000, commenced this action under the provisions of section 51 of the General Municipal Law, to enjoin and restrain the defendants from carrying out the agreement imposed by clause 2 of said order of the public service commission and to annul said agreement, and demanding that said agreement, in so far as it requires the city of Kingston to pay more than 25% of the expense of said elimination, be declared illegal, etc.

At the time of the commencement of this action, subdivision 3 of section 94 of the Railroad Law, in so far as it applied to this action, read as follows:

"3. Whenever a change is made as to an existing crossing or structure in accordance with the provisions of section ninety-one of this chapter, fifty per centum of the expense thereof shall be borne by the railroad corporation, twenty-five per centum by the municipal corporation and twenty-five per centum by the state."

By chapter 663 of the Laws of 1921, which took effect on the 7th day of May, 1921, chapter 481 of the

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Laws of 1910, entitled "An act in relation to Railroads constituting Chapter 49 of the Consolidated Laws," was amended by inserting therein a new section to be section 95a and which, among other things, contains the following provision: "* * * Not less than one-half of such expense to the railroad corporation or corporations, not less than one-quarter of such expense to the county, and the balance, if any, of such expense to the state of New York, if there be funds available to pay the state's share of such expense, and the public service commission shall deem it just that the state of New York share in such expense. If there be no state funds available for such improvement, or, if the public service commission deem it not just that the state contribute toward the cost of such improvement, then and in that event the public service commission shall apportion the balance of such expense to the petitioners as justice may require and as nearly as may be according to the public benefit conferred or to be conferred by the change or alteration. Any sum apportioned to the county or to any other municipal corporation therein by the public service commission shall be a lawful obligation of such county or such municipal corporation, respectively."

The defendants in their answer, in the 13th paragraph or subdivision thereof, allege that the plaintiff was a party to the proceedings before the public service commission and was served with a notice of the hearing personally and appeared therein by attorney and filed written objections verified by the plaintiff; and that the proceeding was brought under section 91 of the Railroad Law. Said section contains the following provision: "* * * Upon any such petition being brought the public service commission shall appoint a time and place for hearing the peti-

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tion, and shall give such personal notice thereof as it shall judge reasonable, of not less than ten days, however, to such petitioner, the railroad company, the municipality in which such crossing is situated, and if such crossing is in whole or part in an incorporated village having not to exceed twelve hundred inhabitants, also to the supervisor or supervisors of the town or towns in which such crossing is situated; and in all cases to the owners of the lands adjoining such crossing and adjoining that part of the street, avenue, highway or road or new portion or additional width of such street, avenue, highway or road to be changed in grade or location, or the land to be opened for a new crossing, and to the state commission of highways in case of a state or county highway."

And the defendants further claim that the plaintiff's remedy was by appeal to the Appellate Division and not by a taxpayer's action. Said section 91 also contains the following clause: "* * * The decision of said public service commission rendered in any proceeding under this section shall be communicated within twenty days after final hearing to all parties to whom notice of the hearing in said proceeding was given, or who appeared at said hearing by counsel or in person." * * *

Said section 91 also provides for the publication of the notice of the hearing, and also contains the following clause: "* * * Any person aggrieved by such decision, or by a decision made pursuant to sections eighty-nine and ninety hereof, and who was a party to said proceeding, may within sixty days appeal therefrom to the appellate division of the supreme court in the department in which such grade crossing is situated, and to the court of appeals, in the same manner and with like effect as is provided

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in the case of appeals from an order of the supreme court."

I think that the parties upon whom notice was served by the public service commission are the people who are parties to the proceeding in the sense of having the right of appeal and that if any individual in the city affected by the proceeding desired to protect his rights by appeal, something more than an appearance in person and by attorney, or either, and the filing of verified objections was necessary. All of this was more or less of an evidential character to be considered by the public service commission as bearing on the question whether the proposed order should be made. Aside from the parties who were required by the statute to be served by the public service commission, if any other person desired to be made a party, he should have made an application to intervene and upon the granting of that application would have become a party to that proceeding who could appeal from the order therein. The legislature seems to have made this distinction in the aforesaid provision of section 91 wherein it provides that the decision shall be communicated to all parties to whom notice of the hearing was given or who appeared at said hearing by counsel or in person, whereas the provision respecting an appeal provides any person aggrieved by such decision who was a party to such proceeding may appeal; and the parties to whom the decision must be communicated are the parties to whom notice of the hearing was given or who appeared at said hearing by counsel or in person as intervenors as aforesaid.

The defendant also by the 15th subdivision of its answer alleges that the New York Central Railroad Company and the public service commission are necessary parties defendant as a plea in abatement.

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The connection of the New York Central Railroad Company appears on the face of the complaint herein; and, also, the allegations with reference to the public service commission, the petition thereto and its action thereon, appear on the face of the complaint. Section 498 of the Code of Civil Procedure provides:

"§ 498. Where any of the matters enumerated in section 488 of this act as grounds of demurrer, do not appear on the face of the complaint, the objection may be taken by answer."

The objections herein appearing on the face of the complaint, they must have been taken by demurrer and not by answer. Section 499 of the Code of Civil Procedure provides as follows:

"§ 499. Objection; when deemed waived.

"If such an objection is not taken, either by demurrer or answer, the defendant is deemed to have waived it; except the objection to the jurisdiction of the court, or the objection that the complaint does not state facts sufficient to constitute a cause of action."

The objection has been waived and the action may proceed against the present defendants alone. *Jones* v. *Gould,* 200 N. Y. 18.

The trial of this action was commenced in the month of January, 1921, before chapter 663 of the Laws of 1921 became a law. But at the time of making this decision, said chapter 663 is in effect. It is the effect of said act which I am called upon to consider, inasmuch as in an equity suit for injunctive relief the rights of the plaintiff where they depend upon a statute are to be determined with reference to the statute in force at the time when the relief, if any, is to be awarded. *Dieterich* v. *Fargo,* 194 N. Y. 359.

If there is any inconsistency between the older and

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the later provisions of the statute, the well settled rule that the earlier must give way to the later applies. The original statute with all its amendments must be read together and viewed as one act passed at the same time; effect must, if possible, be given to all the provisions of the statute. *Matter of Wallace*, 36 Misc. Rep. 1.

Under these rules of construction, I construe the statute as it now stands as follows: Not less than one-half of such expense to the railroad company, not less than one-fourth of the expense and such additional sum in the discretion of the public service commission as may equal one-half of the expense to the municipal corporation; the public service commission being given discretion to apportion the last one-fourth of the expense to the petitioners according to the public benefit conferred. Any sum apportioned to the municipal corporation shall be a lawful obligation of such municipal corporation.

In my opinion, the costs of construction of the sidewalks, pavements, sewers and guard-rails and the cost of relocating or reconstructing existing sewer and water mains, and the costs of and incidental to the acquisition of additional land, or resulting from consequential damages, in excess of $125,000 which by the provisions of such subdivision 2 of the public service commission order were to be borne solely by the city of Kingston, are elements of the costs of eliminating said grade crossing to be added to the other expenses of the elimination, together with all contributions made by the steam surface lines including the thirty-one foot strip of land, but not including the expenses of the trolley lines set forth in subdivision 3 of said order; and that under the existing statute above referred to, the city's share of said expense to be apportioned by the public serv-

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ice commission, shall in no event exceed fifty per cent of the entire expenses of such elimination.

An injunction may issue restraining the defendants from paying more than fifty per cent of the expenses of the elimination of such grade crossing, such items of expense to be made up as hereinbefore indicated.

Judgment accordingly.

CHARLES FRANKEL and SARAH FRANKEL, Plaintiffs, *v.* LAURA RUBIN, JOSEPH RUBIN, Father of Said LAURA RUBIN, and REBECCA RUBIN, Wife of Said JOSEPH RUBIN, Defendants.

(Supreme Court, Monroe Special Term, May, 1921.)

Mortgages — purchase money — foreclosure — infants — guardian ad litem — laches.

After the commencement of an action to foreclose a purchase money mortgage given by defendant, when she was under eighteen years of age, upon a conveyance of real estate to her by plaintiff, one to whom, between the commencement of the action and the entry of judgment, defendant had conveyed the premises under a trust agreement for her own benefit, took the defendant to a reputable attorney who interposed in their behalf an answer and the decision of the court on the trial of the issue raised by the answer of said defendants was the basis of the judgment of foreclosure and sale. Defendant having failed to inform said attorney or any other of the interested parties that she was not of age no guardian *ad litem* was appointed for her, and the action proceeded as though she was an adult. She became of age about a year after the judgment in foreclosure and nearly a year and a half later brought an action to set aside the conveyance made by her but the judgment therein rendered established that she was indebted to her grantee in an amount which included the sum advanced by him for the assignment to him of the foreclosure judgment; that he held the premises in question for the benefit of plaintiff and that she was entitled to a reconveyance

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thereof upon payment by her of the sum so found due and owing, and it was specifically determined in and by said judgment that the mortgage in question here was a valid obligation and that plaintiff, having elected to retain the property, must pay its consideration. *Held*, that her motion to vacate and set aside the judgment of foreclosure and for leave to interpose an answer will be denied, and whether the failure to appoint a guardian *ad litem* for her in the foreclosure action was merely an irregularity or an error of fact not arising upon the trial, was immaterial.

The moving party having for nearly five years after she, concededly, knew all the facts, engaged in constant effort to claim the benefits and avoid the obligations of her contract, it must be held that she, in attempting nearly seven years after she became of age, to disaffirm the mortgage, did not act within a reasonable time.

MOTION to vacate and set aside judgment of foreclosure and permit a defendant to interpose an answer.

Wile, Oviatt & Gilman, for plaintiff.

Averill & Tompkins, for defendant Gordon.

William J. Malony, for defendant Laura Rubin Suckle.

SAWYER, J. On or about June 19, 1911, plaintiff sold and conveyed to the defendant Laura Rubin, she being then not quite eighteen years of age, certain lands described in the complaint herein; $1,000 of the consideration of such conveyance was paid in cash and the balance of $5,700 was secured by her bond and a purchase-money mortgage upon the premises. Miss Rubin having made default in the payment of certain stipulated installments of principal and interest, plaintiff, in the summer of 1913, elected, under the terms of said mortgage, to call the whole amount due and began action for foreclosure,

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which ripened into a judgment December 19, 1913. Between the commencement of the action and the judgment defendant had conveyed the premises to one Hyman Gordon, but under an agreement which was practically a trust for her own benefit. The judgment of foreclosure and sale instead of being executed was then caused by the said Gordon to be, through an intermediary, assigned to himself, he paying the plaintiffs the full amount due and owing thereon. This foreclosure judgment was not, however, one by default, for after the commencement of the action Mr. Gordon, between whom and the defendants there seems to have been friendly relations, took defendants to the Honorable George E. Warner, a most reputable and competent attorney of the city of Rochester, who after examining the matter, interposed in their behalf an answer, and the issue so raised was tried before Mr. Justice Sutherland whose decision thereupon formed the basis for the judgment in question. Apparently the defendants failed to inform Mr. Warner, or any other of the interested parties, that the defendant Laura was not yet twenty-one years of age, for no guardian *ad litem* was appointed for her and the action proceeded as though she, as well as the other defendants, was an adult. She became twenty-one years of age on November 27, 1914, having in the month of February preceding intermarried with one Suckle. In March, 1916, nearly a year and a half after she became of age, she began an action against Mr. Gordon for the purpose of setting aside the deed she had given him; also demanding that the mortgage be adjudged void, the property restored to her possession, and that Mr. Gordon be required to account to her for its use. Issue was joined and a trial was had before Honorable Nathaniel Foote, Official Referee, upon whose decision a judgment was entered Feb-

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ruary 2, 1921; that judgment in brief established that plaintiff was indebted to Mr. Gordon in the sum of $6,803.01, in which amount was included the sum which he had advanced for the assignment to him of the foreclosure judgment; that he held the premises in question for the benefit of Laura and that she was entitled to a reconveyance thereof upon the payment by her of the sum so found due and owing. It is also therein specifically determined that the mortgage in question was a valid obligation and she, having elected to retain the property, must pay its consideration. She now comes into court seeking to avail herself of the fact that no guardian *ad litem* was appointed for her in the foreclosure action and asks that, because of such omission, the judgment be vacated and she be permitted to again defend. The proposed answer, filed with the motion papers, shows that she now intends to repudiate the entire transaction, require plaintiffs to accept a reconveyance of the property, return to her all moneys paid thereon with interest, and cancel said bond, mortgage, and judgment.

I think such a motion cannot be now granted. Whether the failure to appoint for her in the foreclosure action a guardian *ad litem* was an irregularity, as was stated by Judge Foote in the action tried before him, or an error of fact not arising upon the trial, as is held in *Byrnes* v. *Byrnes*, 109 App. Div. 535, is of little consequence. Sections 1282 and 1290 of the Code of Civil Procedure limit the time when motions upon either of those grounds may be made to be one and two years respectively, while section 1291 provides that when a party is under twenty-one years of age the time of such disability not exceeding five years shall not be a part of the time so limited. Therefore, the time when under the provision of those sections this motion could be made had completely

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and entirely expired at the end of two years after defendant attained her majority, or on November 29, 1916.

There is to my mind another reason, and one which reaches the very merits of the controversy, why this motion ought not to be granted. This defendant in March, 1916, had full knowledge of the entire transaction and its probable effect upon her. I am also quite convinced from the entire panorama of facts that she was equally well informed upon the subject at and before the time she became twenty-one years of age. Instead of repudiating the transaction, offering to deed back, and demanding the return of her money, and the cancellation of her indebtedness, she elected to retain and hold the benefits of her purchase, and endeavor to avoid payment of her just obligation therefor. She spent almost five years in the effort to thus obtain this property without paying her indebtedness thereon, and in the end was very justly and properly defeated. Undoubtedly she was disappointed at the outcome, but having thus elected to assert her rights under the deed, she cannot now be permitted to reject the court's judgment rendered upon her own initiative, make a new election, and institute another litigation in the hope of thereby avoiding the liability which her previous action established.

The law carefully protects the rights of infants and, even though their contracts have been fully executed, allows them a reasonable time after arriving at age to disavow same if they wish. It, however, has some regard for the rights of those dealing with infants, and especially where, as here, such dealing was apparently had with concealment of infancy upon the one side and ignorance thereof upon the other. These mutual rights require that an infant use its

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legal power to disaffirm its executed contract within that reasonable time and failing to do so shall be held to full accountability for its contracts. Applying that rule to these facts I am fully persuaded that this defendant not having attempted to disaffirm her contract with plaintiffs until nearly seven years after she became of age did not act within a reasonable time. *Beardsley* v. *Hotchkiss*, 96 N. Y. 201. This is particularly so when it is remembered that for nearly five years after she, concededly, knew all the facts, she was engaged in a constant effort to claim the benefits and avoid the obligations of the contract in question. She would perhaps have been better off had she recalled and acted upon the homely old saying: "The tail goes with the hide."

The original judgment roll is made a part of the moving papers and in his brief her counsel states that this roll does not contain any affidavit of service of the summons upon her. In her own affidavit used on the motion she carefully refrains, however, from denying that such service was made, contenting herself with saying that she "does not now recall whether or not any papers in said action were ever served on" her. That she did authorize Mr. Warner to appear therein for her she does not deny; that he did appear for her and that she, with the other defendants, answered and litigated the question involved is admitted. To hold under such circumstances after all these years, with her full acquaintance with all the facts during most of them, that because of the absence from the roll of formal proof of service, and her lapse of memory, the judgment should be vacated because jurisdiction of her person was not obtained would in my thought be a travesty on justice.

Motion denied, with costs.

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SABIN C. SCHUMMERS, Plaintiff, v. JOSEPH B. MARTIN, Defendant.

(Supreme Court, Monroe Special Term, May, 1921.)

Conversion — automobiles — hiring — right of possession.

Where on the trial of an action for the conversion of an automobile it was proved, as alleged in the complaint, that the car at a certain time had been rented to a corporation and under a charge that there was a question of fact as to whether the lease made with the corporation was subsisting when the alleged conversion occurred, and whether plaintiff was entitled to possession of the car at that time, the jury found for the defendant, a motion for a new trial on the minutes because of the trial court's refusal to charge that plaintiff could not recover if the jury found that the corporation did not have the right to the possession of the automobile, will be denied.

MOTION for new trial on the judge's minutes.

Leo J. Rice, for motion.

Lewis A. Gilbert, opposed.

RODENBECK, J. This action is one to recover damages for the conversion of an automobile. It is alleged in the complaint and appeared on the trial that at a certain time the machine had been rented to the James F. Leary Construction Company, Inc. The question arose on the trial as to whether or not the plaintiff was entitled to the possession of the car at the time of the alleged conversion. The defendant claimed a lien on the car for repairs and sold it under his lien. The question of the right of the plaintiff to the possession of the car was submitted to the jury who determined the question against the plaintiff and found a verdict for the defendant. The

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plaintiff now claims that his ownership of the car was sufficient to authorize him to maintain the action. In this claim he is mistaken. As was said by Mr. Justice Jenks in *Byrne* v. *Weidenfeld*, 113 App. Div. 451, in an action for conversion, the plaintiff is required "to show an existing right to the immediate, actual possession" of the property out of which the action arose. The action for conversion is a possessory action. If the plaintiff is not entitled to possession even though he be the owner of the property, he cannot maintain the action. "Trover may be brought by any one whose ownership of, or special interest in, the property involved entitles him to the immediate possession thereof at the time of its conversion." 38 Cyc. 2050. Where the plaintiff has leased the property to another who is in the lawful possession thereof at the time of the alleged conversion, the plaintiff is not entitled to immediate possession and is therefore not entitled to maintain the action. Similar language to that quoted above from the Cyclopedia of Law is found in the American and English Encyclopedia of Law (Vol. 28, p. 659): "Whoever has the legal title to chattels and right to their possession may maintain trover for their wrongful conversion." 28 Am. & Eng. Ency. of Law, 656. "To maintain trover the plaintiff must have a property right in the goods or chattels converted, and the actual possession of them or a right to the possession at the time of conversion." 2 Wait's Law & Pr. 1362; *DuBois* v. *Harcourt*, 20 Wend. 41.

In view of the charge of the court previously made the court was not required to charge as requested that the defendant could not recover if the jury found that the Leary Construction Company did not have the right to the possession of the automobile. The jury clearly understood that there was a question of

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fact as to whether or not the lease made with the Leary Construction Company was in existence when the alleged conversion occurred and whether or not the plaintiff was entitled to possession at that time. No further charge on the subject was necessary. The jury could not have been misled by the charge of the court and the refusal to charge as requested as was the case in *Johnson* v. *Blainey*, 198 N. Y. 312. The motion for new trial is denied.

Motion denied.

Matter of the Application of GRACE D. VALENTINE for a Determination as to the Construction and Effect of the Will of WILLIAM H. VALENTINE, Deceased.

(Surrogate's Court, Bronx County, June, 1921.)

Wills — construction of — dower.

Where a bequest of the income of two-thirds of the residuary estate for the benefit of testator's widow is declared to be in lieu of dower and the only change with respect to her, made by a codicil by which testator ratified and confirmed his will in every respect, so far as any part thereof was inconsistent with the codicil, was to add a further limitation to the widow's right to receive income, by providing that the same should be paid to her so long as she remained the widow of the testator, there is nothing inconsistent between the will and codicil with respect to dower.

PROCEEDING under section 2615 of the Code of Civil Procedure for the construction of a will.

William S. Jackson, for petitioner.

Salter & Steinkamp, for respondents.

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SCHULZ, S. By paragraph 4 of his will, the testator gave all the rest, residue and remainder of his estate, real and personal, to his executors in trust to divide into three equal parts, and by subdivision I of said paragraph he provided that two of said parts be invested and the income thereof, after the payments specified, be paid over to his wife during her natural life, and thereafter to his adopted daughter, and upon the death of both of these persons, the principal be transferred and conveyed to the issue of the adopted daughter. The subdivision further provides as follows: "* * * the provision herein for the benefit of my wife shall be in lieu of dower."

The 2d paragraph of the codicil to said will contains the following provision: "As to Section Fourth of my said Will, paragraph I, thereof, which among other things directs that the Executors and Trustees in my Will to pay two-thirds of the net income to my wife Grace D. Valentine for and during her natural life and after her death to pay same to my adopted daughter Martha V. Standfast, I by this Codicil to my said Will direct my Executors and Trustees instead of paying two-thirds of the said net income as mentioned in my said Will to my said wife during her natural life, to pay the said two-thirds thereof to my said wife for and during her natural life or so long as she remains my widow whichever of such events first happens and from and immediately after the death or remarriage of my said wife to pay the same to my said adopted daughter Martha V. Standfast during her life and on her death to her issue, and I hereby ratify and confirm my said last Will and Testament in every respect save so far as any part of the same is inconsistant with this Codicil."

It seems not to be disputed that the provisions in

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the will as distinguished from the codicil were clearly in lieu of her dower. It is contended by the petitioner, however, that the provisions contained in the codicil were substituted for those in the will, and as it was not stated in the codicil that they were in lieu of dower, it is urged that the widow is entitled to receive her dower in addition to the benefits to which she is entitled under the will and codicil.

The only change with respect to his widow which the testator made by the codicil was to add a further limitation to her right to receive income by providing that the same be paid to her *so long as she remained his widow.* The 4th paragraph of the will and the 2d paragraph of the codicil must be read together, and if so read, it seems to me clear that there is nothing inconsistent between them with reference to the widow's dower. As the testator ratified and confirmed his will in every respect, save so far as any part of the will was inconsistent with the codicil, I reach the conclusion that it was the intention of the decedent that the provisions in favor of his wife contained in paragraph 4 of the will as modified and changed by paragraph 2 of the codicil were in lieu of dower. It is also urged that the general scheme of the whole will and codicil shows such an intent, but as I am satisfied that the language of the two paragraphs expresses the same, it is not necessary to discuss that contention.

Decreed accordingly.

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Matter of the Estate of HELEN E. KELSEY, Deceased.

(Surrogate's Court, New York County, June, 1921.)

Wills — construction of — residuary clause — survival.

The residuary clause of the will of testatrix, who left her surviving, two daughters and two sons, provided: "To my executors hereinafter named I give and bequeath and devise all the rest residue and remainder of my estate real and personal whatsoever and wheresoever. * * * And to apply the net income arising from all the rest of said residue and remainder of said proceeds to the use of my son Oscar during his natural life and the principal thereof to be equally divided among his children at and upon his decease, should he leave children surviving him, but in case of his death without leaving surviving him any children such last mentioned principal shall be divided equally among my other children Charles, Anna and Helen, if then living and if any of them shall then be dead the children of such deceased child shall together take the share to which their parent would have been entitled if living." Charles predeceased Oscar, without issue, and at the time of the latter's death both of the daughters were living. Upon the accounting the executrix of Charles claimed one-third of a fund to which testatrix became entitled under the will of her deceased husband. *Held,* that as to such fund, the testatrix did not die intestate, but that it passed under the residuary clause of her will and that the decree to be entered upon the accounting should provide for the equal distribution of said fund between the estates of her daughters.

CONSTRUCTION of a will upon an accounting.

Wellman, Smyth & Scofield, and Geller, Rolston & Blanc, for trustees and administrators c. t. a.

Charles C. Sanders (Edward J. McGuire, of counsel), for Nellie Kelsey.

FOLEY, S. The construction of the will becomes necessary upon this accounting. By my decision in

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Matter of Kelsey, 184 N. Y. Supp. 67, the estate of this testatrix (his widow) became entitled to a certain fund. At the outset I hold that the testatrix did not die intestate as to that fund, but that it passed under the residuary clause of her will. *Floyd* v. *Carow,* 88 N. Y. 560; *Matter of Miner,* 146 id. 121; *Lamb* v. *Lamb,* 131 id. 227.

Testatrix left her surviving four children, Anna, Helen, Charles and Oscar. The residuary clause in her will provided: "To my executors hereinafter named I give and bequeath and devise all the rest residue and remainder of my estate real and personal whatsoever and wheresoever. * * * And to apply the net income arising from all the rest of said residue and remainder of said proceeds to the use of my son Oscar during his natural life and the principal thereof to be equally divided among his children at and upon his decease, should he leave children surviving him, but in case of his death without leaving surviving him any children such last mentioned principal shall be divided equally among my other children Charles, Anna and Helen, if then living and if any of them shall then be dead the children of such deceased child shall together take the share to which their parent would have been entitled if living."

The son Charles predeceased Oscar, without issue, and at the time of Oscar's death, Anna and Helen were living. The executrix of Charles claims one-third of the fund upon the theory that the remainder vested in him at the death of the testatrix. An alternative claim is made by her to one-twelfth of the fund on the theory that the will did not dispose effectively of the one-third of the remainder bequeathed to Charles, that the testatrix died intestate as to such one-third, and thereby Charles, as one of her next of kin, became entitled to that share. The controlling

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language of this paragraph is the phrase "*if then living.*" It fixed the persons who were to take upon the death of Oscar, the life tenant. The intent of the testatrix is clear and explicit and no citation of rules of construction must be permitted to alter or defeat it. The testatrix provided in effect that Helen, Charles or Anna must survive at the date of death of Oscar in order to take. A substitutional gift was provided in case of the death of either before Oscar, in favor of the children of such deceased child. The survivors took the whole fund in equal shares. By giving the entire remainder to the children surviving at the death of Oscar, she excluded any child who predeceased him. The situation here is similar to that in *Matter of Buechner,* 226 N. Y. 440, where the word "living" was used to define persons who would take upon the happening of the determining event — the death of the life tenant. Cardozo, J. (at pp. 443, 444) pointed out that there is no need to resort to technical rules of construction to ascertain beneficiaries "when the testator has defined the membership himself." "We need no canon of construction to justify that holding except, indeed, the primary one, to which all others are subordinate, that the intention of the testator is to be sought in all his words, and, when ascertained, is to prevail (*Robinson* v. *Martin,* 200 N. Y. 159, 164; *Mullarky* v. *Sullivan,* 136 id. 227, pp. 230, 232)." See also *Matter of Baer,* 147 N. Y. 348; *Metropolitan Trust Co.* v. *Krans,* 186 App. Div. 368; *Matter of Crane,* 164 N. Y. 71; *Schwartz* v. *Rehfuss,* 129 App. Div. 630; affd., 198 N. Y. 585; *Lyons* v. *Ostrander,* 167 id. 135, 138.

The construction adopted by me was also accepted by Mr. Justice Delehanty (*Kelsey* v. *Barbey, Kelsey* v. *Gibson,* N. Y. L. J., July 1, 1915), in actions brought in the Supreme Court, New York county, by the widow

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of Charles Kelsey, involving other funds passing under the same clause, against the remaindermen, Anna Kelsey Barbey, and the estate of Helen Gibson. The various cases cited by counsel for Nellie Kelsey are not applicable here for in none of them were the words "if then living" or similar language used. While the determination in the Supreme Court seems to be *res adjudicata,* I prefer to base my conclusion upon an independent construction of the will.

The decree should, therefore, provide for distribution of the fund equally between the estates of the daughters, Helen and Anna.

Decreed accordingly.

Matter of the Estate of AMELIA N. DUNLAP, Deceased.

(Surrogate's Court, New York County, June, 1921.)

Transfer tax — irrevocable trust deed — vested remainders.

An irrevocable trust deed executed by decedent provided that during her life the entire income from the trust estate should be paid to her four children in equal shares and in the event of the death of one of them, leaving issue, the income was to be paid to such issue, but if none, then to the surviving children. Upon the death of the grantor three-fourths of the property was to be distributed among her daughters or the issue of deceased daughters, and the income from the remaining one-fourth was to be paid to the son of testatrix for life, with remainder to the daughters or their issue. *Held,* that under the trust deed the daughters took a vested remainder in three-fourths of the trust estate, which, however, they could not possess or enjoy until after the death of their mother.

The death of the mother making no difference in her son's enjoyment of the remaining one-fourth of the property passing by the trust deed, the transfer to him thereunder was not subject to a transfer tax, but the transfer to the daughters was properly taxable as of the date of the death of decedent.

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Misc.] Surrogate's Court, New York County, June, 1921.

APPEAL from order fixing transfer tax.

Davies, Auerbach & Cornell (Charles E. Hotchkiss, Louis F. Schwartz, Jr., and Sydney G. Soons, of counsel), for Columbia Trust Company, trustee.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for State Comptroller.

FOLEY, S. This appeal is taken by the trustee under a deed of trust dated May 11, 1917, executed by decedent, who died May 2, 1920, from the order fixing the transfer tax herein on the ground that the appraiser has erroneously reported as taxable the transfer of the property conveyed by the trust deed and on the further ground that such transfer, if taxable, became effective as of the date of the deed and not as of the date of the death of the decedent.

It was provided by the deed that during the life of the grantor the entire income from the trust property should be paid to the grantor's four children in equal shares. In case of the death of a child leaving issue, the income to be paid to such issue, but if none, then to the surviving children. Upon the death of the grantor three-fourths of the property was to be distributed among her daughters, or the issue of deceased daughters. The income from the remaining one-fourth was to be paid to the son for life with remainder to the daughters or their issue.

Under the instrument the daughters took a vested remainder, (subject to be divested in the event of their predeceasing the grantor,) in three-fourths of the fund, which, however, they could not possess or enjoy until after the death of their mother. In *Matter of Green*, 153 N. Y. 223, 228, it is stated, " The death of the donor was the event which made the transfer complete and effective and secured to the nieces the

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possession and enjoyment of the property (*In re Seaman*, 147 N. Y. 77)." Therefore, as to (1) the three-fourths of the property, the gift by the trust deed must be considered as a transfer intended to take effect in possession or enjoyment at the death of the donor. Tax Law, § 220, subd. 4; *Matter of Cruger*, 54 App. Div. 405; affd., 166 N. Y. 602; *Matter of Garcia*, 183 App. Div. 712.

(2) As to one-fourth of the property conveyed by the trust deed, the income from which was to be paid to the son of the grantor for life, the death of decedent made no difference in his enjoyment of the property. The instrument itself was complete and irrevocable and the conveyance absolute. Under these circumstances the transfer of the property to decedent's son is not taxable. *Matter of Bowers*, 186 N. Y. Supp. 912.

The order fixing tax, in so far as appealed from, is reversed as to the tax on one-fourth of the corpus of the trust. The transfer is properly taxable as of the date of death of the grantor. Examination of the order fixing tax in *Matter of Cruger, supra*, shows that the same rule was followed in that case. An order may be entered on notice correcting the taxing order in accordance with this decision.

Matter of the Estate of AMELIA S. BARTLET, Deceased.

(Surrogate's Court, New York County, June, 1921.)

Wills — when legacy does not lapse.

Where a legacy to each of the two nieces and the nephew of testatrix is followed by a gift over upon the death of either of them to their respective heirs, the heirs of the nephew, who died three days before the will was executed, are entitled to take the legacy.

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Misc.] Surrogate's Court, New York County, June, 1921.

PROCEEDINGS upon an accounting.

John M. Rider, for petitioner.

Hill, Lockwood & Redfield, for residuary legatees.

Perkins & Train (Charles Albert Perkins, of counsel), for Mary P. Tyng, assignee of Charles S. M. Bartlet, heir of Henry P. Bartlet.

Joseph M. McCloskey, special guardian.

FOLEY, S. A question arises on this accounting as to the persons entitled to a legacy under the 6th paragraph of the will, which reads as follows: "I give and bequeath * * * to Mary Tyng, Henry P. Bartlet and Dorothy Bartlet, now residing in California, each the sum of eight thousand and three hundred and thirty-three and 33/100 ($8,333.33) dollars; and in the event of the death of any of the aforesaid * * * last mentioned persons, I direct that the share of such deceased persons shall go to their respective heirs."

Henry P. Bartlet, a nephew of testatrix and one of the above named legatees, died in California three days before the will was executed. The residuary legatees claim that because of this fact the legacy is void and falls into the residuary estate. On the other hand. the heirs of the deceased legatee contend that they are entitled to the legacy.

The claims of the residuary legatees are overruled and the decree must provide for payment to the heirs of Henry P. Bartlet. Ordinarily when a legatee or devisee dies before the testator or before the making of the will the legacy lapses. *Matter of Tamargo*, 220 N. Y. 225; *Matter of Werlich*, 230 id. 516, 520. It has been the established law of this state since *Down-*

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ing v. *Marshall,* 23 N. Y. 366, 370, that the doctrine of lapse has no application to substituted gifts. In the latter case there was a bequest to the testator's son for life with remainder to his heirs in case he died leaving issue, and in case he died without leaving issue, to his nephews and nieces. The court held that there was no lapse but that the contingent limitation took effect in favor of the nephews and nieces. The opinion points out that the reason for the general rule as to lapsed legacies is based upon the ambulatory nature of a will which cannot take effect in favor of persons who die before the testator, because until then the instrument can have no effect at all. In certain cases where the bequest is to a child or other descendant of testator, or to a brother or sister, who dies leaving descendants, the legacy is saved. Decedent Estate Law, § 29. "But the principle which, at the common law occasioned, and still may occasion, the lapse of a legacy or devise, can have no application to substituted gifts. The primary gift may lapse or fail if its object dies before the will can operate at all, but this has no tendency to defeat an independent and ulterior limitation to other objects who are living at the testator's death. In such cases the question is not one of lapse, but of interpretation." *Downing* v. *Marshall, supra,* 370. See, also, *Utica Trust & Deposit Co.* v. *Thompson,* 87 Misc. Rep. 31, 51; *Matter of Miller,* 161 N. Y. 71; affg. 11 App. Div. 337; *Williams* v. *Jones,* 166 N. Y. 522, 537; *U. S. Trust Co.* v. *Hogencamp,* 191 id. 281, 285; *Matter of Gilman,* 175 App. Div. 185, 187; affd., 220 N. Y. 659.

My learned predecessor, Surrogate Fowler, in his work on the Decedent Estate Law, carefully analyzes the history of the rule of lapsed legacies, and the exceptions to it particularly where the testator expressly provides for substitution in case of the

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death of the first legatee. Fowler's Dec. Est. Law, 232, 239. The English cases are similar to the decision in *Downing* v. *Marshall, supra; Hannam* v. *Sims,* 2 De G. & J. 151; *Ive* v. *King,* 16 Beav 46. Counsel for the residuary legatees rest upon the case of *Meeker* v. *Meeker,* 4 Redf. 29, decided in 1879, as authority for their contention. That decision does not appear to have been cited in any later case, and because of the peculiar nature of the will and the special rules of construction applied in the opinion by the surrogate, has no application to the facts here. The surrogate did not refer to *Downing* v. *Marshall, supra,* and to my mind the result reached by him was erroneous. There are certain cases holding that the legacy lapses where the legatee died before the date of the will, for instance, where there was a bequest to a class (*Pimel* v. *Betjemann,* 183 N. Y. 194), or to designated persons "their heirs and assigns." *Matter of Tamargo, supra; Matter of Reynolds,* 109 Misc. Rep. 453; affd., 192 App. Div. 937; *Matter of Wells,* 113 N. Y. 396, 400. The gift here was not to a class, nor of an aggregate amount, but to specified persons for a specified amount, with the express direction substituting other persons "in the event of the death" of Henry P. Bartlet. *Matter of Kimberly,* 150 N. Y. 90; *Herzog* v. *T. G. & T. Co.,* 177 id. 86, 97. The gift over to the heirs of Henry P. Bartlet was as direct and unambiguous as the original gift to him. The direction of the testatrix must be carried out.

Decreed accordingly.

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Matter of the Estate of PATRICK DONOHUE, Deceased.

(Surrogate's Court, New York County, June, 1921.)

Wills — contested probate — lack of testamentary capacity — verdict sustained.

Where testator at the age of seventy-five made his will and subscribed it by his mark, and upon a contested probate the evidence upon the single question submitted to the jury was conflicting and from which different inferences might fairly be drawn, a motion to set aside a verdict that the testator was of unsound mind on the date of the execution of the will will be denied where the testimony of the attending physician as to testator's delusions, irrational acts and mental incompetency at the time of the making of the will, is sufficient to sustain the verdict.

PROCEEDING upon the probate of a will.

George W. Bristol, for proponent.

William Dike Reed, for contestant.

FOLEY, S. The motion of the proponent to set aside the verdict is denied. The jury found in answer to the single question submitted that the decedent was not of sound mind on the date of execution, October 2, 1919.

The testator was then about the age of seventy-five years. He had been married to the contestant for forty-five years and lived with her on terms of affection. He had long been ill of cancer. The decedent left, besides his widow, a brother, nephews and nieces. The draftsman of the will was procured by a friend of the principal beneficiary. The will was subscribed with the testator's mark.

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The will first bequeaths two savings bank accounts amounting to $6,000 (all the property possessed by him), to Maria Egan, a niece. After this general legacy there was inserted a residuary clause giving all the rest, residue and remainder of his property to his "beloved" wife. This clause was clearly futile, because there was no property left to pass under it. It is hard to believe that the testator, a man of no great intelligence, would knowingly practice this subtle testamentary deception upon his faithful wife of almost half a century. The will also sets forth that he had previously amply provided for his wife, and that she had more than sufficient funds to support her during the rest of her life. The contestant sharply disputed the truth of this declaration.

The testimony of Dr. Egan, the attending physician of the deceased, as to delusions, irrational acts and mental incompetency at the time of the making of the will was sufficient to sustain the verdict. He was a physician of standing and experience. His observations were based upon frequent professional visits. He was, therefore, in a better position to know decedent's condition than most of the others who testified. The evidence of the various witnesses for the proponent related, to a great extent, to the condition, acts and conduct of the deceased more or less remote from the date of execution. The material question here, as in all probate contests, is the mental condition of the testator at the time of execution. The testimony of the subscribing witnesses — one of them a reputable attorney — while establishing the requisite formalities, must have been given little weight by the jury on the issue of capacity. These witnesses did not know the testator before the date of signing, and their opportunity for observation was exceedingly limited.

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The evidence was conflicting and different inferences might fairly be drawn therefrom. The issue was, therefore, for the jury. *Matter of Barney,* 185 App. Div. 782; *Matter of Hurley,* 189 id. 664; *Matter of Eno,* 196 id. 131; *Matter of Strong,* 179 id. 539. After careful consideration of the evidence I believe that the verdict was amply sustained and should not be disturbed. If there was a retrial, the result, in my opinion, would be the same. This probability must be taken into consideration by the court. *Matter of Spang,* 197 App. Div. 310. "Questions of fact arising in an action to determine the validity of a will are no different in this respect from questions of fact in any other case. * * * The good sense of the jury, when aided by proper instructions from the court, is the best and, indeed, the only protection that litigants ordinarily have in the determination of issues of fact, depending upon conflicting evidence, even when such issues arise in actions to determine the validity of the most important testamentary instruments." *Hagan* v. *Sone,* 174 N. Y. 317, 323. The jury was not influenced by sympathy, prejudice or bias, and the motion must be denied.

Decreed accordingly.

Matter of the Probate of the Last Will and Testament of MATILDA E. BURNHAM, Deceased.

(Surrogate's Court, Westchester County, June, 1921.)

Wills — testamentary capacity — verdict of jury that testatrix was of unsound mind and lacked testamentary capacity sustained.

A competent testator must have strength and clearness of mind and memory sufficient to know in general, without prompting, the nature and extent of the property of which he is about

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to dispose, the nature of the act which he is about to perform, and the names and identity of the persons who are the proper objects of his bounty and his relation to them.

Testatrix left her surviving as her sole next of kin a son forty-four years old, an incompetent, a victim of epilepsy since he was eleven years of age and who at present is an inmate of a state hospital. When she was about seventy-two years of age and suffering from cancer, Bright's disease, kidney trouble and fistula she was removed to a hospital in an exhausted condition where she died early the next morning. On the evening of the day before she went to the hospital she made a will by which she bequeathed all of her property, worth about $150,000, to strangers of the blood, to friends and to charities, and within twenty minutes thereafter became bluish. Upon the contested probate of the alleged will brought by the disinherited son, there was introduced in evidence a former will made by decedent about eighteen months before her death while apparently she was in good health, under the terms of which, after certain legacies to much the same persons mentioned in the instrument sought to be probated, the balance of the estate was given to charity. It was conceded, however, that under the former will, decedent died intestate as to about $30,000, which passed to her son because the gift to charity was in violation of section 17 of the Decedent Estate Law. The new alleged will, by language involved and complex, diverts from the son the interest he would take by force of the Statute of Distributions and by a method not calculated to be altogether clear until a final accounting, adds the $30,000 to legacies already given, by definite and fixed amounts, but by a method sure in diverting from the son that which fell to him by reason of his mother's intestacy. By special verdict the jury found that at the execution of the instrument offered for probate, the testatrix was of unsound mind and lacked testamentary capacity, but that the execution of said instrument was not procured through restraint, fraud or undue influence. *Held*, that the verdict was not so far against the weight of evidence as to indicate sympathy, passion or prejudice as its procuring cause, and therefore proponent's motion to set aside the verdict upon the issue of mental capacity will be denied and probate of the instrument refused because of the jury's finding that testatrix was mentally incapable of executing the instrument.

The finding of the jury upon the other issues submitted was consistent with the finding upon the issue of testamentary

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capacity, and contestant's motion to set aside the verdict upon said other issues, on the ground that it was against the evidence and the weight of evidence and contrary to law, will also be denied.

PROCEEDING upon the probate of a will.

Herman A. Schupp (Martin Conboy and Joseph F. Collins, of counsel), for proponents.

Frederick P. Close and Edward S. Slater (Lee Parsons Davis, of counsel), for special guardians and contestants.

SLATER, S. Upon the trial, the issues numbers 1, 2 and 3, all relating to the execution of the will, were taken from the jury and a verdict directed by the court in favor of the will. The issue number 4 relates to testamentary capacity, and the issues numbers 5 and 6 relate to restraint, fraud and undue influence. The jury found, in answer to the specific question number 4 that, at the time of the execution of the will, the decedent was of unsound mind and did not possess testamentary capacity, and, as to the specific questions numbers 5 and 6, that the will was not procured through restraint, or fraud, or undue influence.

The proponents move to set aside the specific verdict of the jury upon the issue of mental capacity. The contestant moves to set aside the specific verdict of the jury upon the issues of restraint, fraud and undue influence. These motions are made because it is claimed that the verdict of the jury upon these issues is against the evidence and the weight of evidence and contrary to law.

The application of the tests, applied by this court in *Matter of Tymeson,* 114 Misc. Rep. 643, when

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applied in the instant case, compelled the court to submit the issues to the jury. The law now gives the determination of questions of fact in a case like this to a jury for their verdict, and the court is not justified in withdrawing such questions from the consideration of a jury, if upon a consideration of the entire evidence, reasonable men might draw different inferences. *Tousey* v. *Hastings,* 194 N. Y. 79; *Matter of Case,* 214 id. 199. The correct rule applicable to this case is stated in *Hagan* v. *Sone,* 174 N. Y. 317, 323, as follows: "The plaintiff's proof might not have satisfied the jury that the deceased was either incompetent to make a will or subjected to any undue influence, but there was enough of it to require us to hold that the jury was the branch of the court that the law required to pass upon it. Questions of fact arising in an action to determine the validity of a will are no different in this respect from questions of fact in any other case. When evidence is given of such a character that different inferences may fairly and reasonably be drawn from it, the fact must be determined by the jury. The good sense of the jury, when aided by proper instructions from the court, is the best and, indeed, the only protection that litigants ordinarily have in the determination of issues of fact, depending upon conflicting evidence, even when such issues arise in actions to determine the validity of the most important testamentary instruments." *Matter of Strong,* 179 App. Div. 547.

A mere scintilla of evidence is not sufficient to overcome the presumption of the sanity of the party executing the will and the verdict of the jury must be considered and its effect determined under the same rules that govern the court in the review of the verdict of the jury in other cases where by the constitution or by the statute the parties have the

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right to a jury trial. *Matter of Eno,* 196 App. Div. 131; *Matter of Spang,* 197 id. 310; N. Y. L. J., June 13, 1921.

In the instant case the conflict of evidence is clear and warranted the submission of the issues to the jury as sole judge of the facts. *Matter of Barney,* 185 App. Div. 782; *Matter of Hurley,* 189 id. 664; *Matter of Eno, supra; Matter of Donohue,* 115 Misc. Rep. 586.

Mrs. Burnham was about seventy-two years of age. She left as her next of kin an only child, a son aged forty-four years, an incompetent, a victim from epilepsy from about the age of eleven years, who is the contestant herein. This son is now an inmate of the State Hospital at Poughkeepsie, N. Y. The will bequeathes practically $150,000 of property, all to strangers of the blood, to friends and to charity; disregarding all claims of nature. The son was disinherited. The will was what might be termed a death-bed will. *Matter of Seagrist,* 1 App. Div. 615, 620. It was an unnatural one and contrary to natural duty, or affection. There was offered in evidence a prior will, made about eighteen months before the death of the decedent, while she apparently was in good health, under the terms of which prior will, after giving certain legacies to much the same people as mentioned in the latter will, she disposed of the balance of the estate to charity. The present will was made while the testatrix was on her death-bed, and weakened by disease. So far as the contestant is concerned, the vital change made in the present will from the former one is found in the 7th paragraph. It was conceded by counsel on both sides that under the terms of the former will, the decedent died intestate as to about $30,000 which passed to the incompetent son, because the gift to charity violated sec-

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tion 17 of the Decedent Estate Law. The new and added portion to the 7th paragraph as set forth in the present will is involved and complex. It gives the residue which would have passed to the son under the former will to the legatees in the 3d paragraph of the present will, in addition to their legacies therein stated, in proportion to the amounts given. This additional gift is indirect and confusing to even a normal mind. The new paragraph diverts from the testatrix's son the interest he would take by force of the Statute of Distribution, under the former will. The new and added clause is as follows: "In the event, however, it shall appear that the sum which might be payable to the Library and Reading Room of the Village of Port Chester, under the provisions of this paragraph, would be, or represent more than one-half part of my estate after the payment of my debts, the surplus over said one-half part, I direct shall be added to the legacies provided for in the several subdivisions of paragraph third of this will, and that all of said legacies in said paragraph then shall be increased proportionately."

It adds the $30,000 to the legacies already given by definite and fixed amounts, by a method not calculated to be altogether clear until a final accounting, but by a method sure in diverting from the son that which fell to him by reason of the mother's intestacy of part of her estate.

Therefore, the only question for my determination is whether the verdict is against the weight of evidence and so far against the weight of evidence as to indicate sympathy, passion, or prejudice as the procuring cause of the verdict. Is there enough evidence to support the finding that the decedent was not of sound mind when she executed the paper propounded as her last will and testament? *Matter of*

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Ruef, 180 App. Div. 203; affd., 223 N. Y. 582; *Matter of Case*, 214 id. 199. While the proponents claim there is some evidence in the case to establish the mental capacity of the decedent, there is abundant evidence to the contrary. There is ample evidence that the decedent was a loving mother and had the usual natural affection for an afflicted child. She with infinite patience waited for the day when the boy should come home to her from the asylum cured from his mental ailment.

We are now confronted with the important inquiry as to the decedent's mental condition on the evening in question. Was she in all respects competent to make a will? Code Civ. Pro. § 2614. The decedent had been suffering from a prolonged illness and had been under the care of a physician and nurse since June, 1920. Mrs. Burnham died November 6, 1920, at about four o'clock A. M. at the United Hospital in Port Chester, where she had been removed from her home at about ten o'clock the evening before. The will was executed at about, or a little after, eight o'clock on the evening of November 5, 1920, at her home. She was a sufferer from cancer, Bright's disease, kidney trouble and fistula. The daily charts of the attending nurse from September nineteenth to and including the time of her death are in evidence in the case and are highly important. These charts indicate her physical condition during all this time and show conclusively that her condition was rapidly becoming worse. The nurse fully explained them and told of the patient's general physical condition. The decedent was informed about October first by her physician that she had cancer and, from that time, her condition kept getting worse. We now approach the evidence bearing on the mental condition of the deceased at the particular time when she executed

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the will. On November third her illness became desperate, says the nurse. The deceased was in bed. She was gradually growing weaker. She had frequent vomiting spells, was cold and had a clammy perspiration. On November fourth, the intestines blockaded for good. *Matter of Strong*, 179 App. Div. 539, 545. The nurse testified that on November fifth she was in an exhausted condition. On the afternoon of November fifth at two P. M., she commenced to vomit fecal matter. She vomited during that day at intervals of about one hour and had a vomiting spell at about seven-thirty P. M.—thirty minutes before the will was executed. During the day of November fifth, her heart was weak and she was dizzy in the head. Within twenty minutes after the signing of the will she became bluish. At seven-thirty o'clock, she asked for Mr. Schupp, the attorney. He arrived in about fifteen minutes. The prepared will was in his possession. There is testimony that the telephone call was "Aunty is asking for you. Will you come around as soon as you can?" He apparently had the same paper Mrs. Allen referred to in her testimony, when she swore Mrs. Burnham had said to her a week before: "Herman has been here and wants me to sign some papers and I told him I would go to his office some time." In this manner she had refused to execute the paper in October at a time when Mrs. Allen said she was rational. The evidence clearly shows that at the time the attorney arrived, she was in a critical condition. She was *in extremis*.

There is a conflict in the testimony of the nurse given upon the trial, and her prior testimony given in December, 1920, before the surrogate in her examination as a witness to the will. Code Civ. Pro. § 2611. It relates to an important circumstance

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prior to the time of the execution of the will. Did Mrs. Burnham, or did Mr. Schupp, her attorney, ask the nurse to send for a neighbor to act as a witness? Her testimony upon this point is at variance and contradictory in the two examinations.

The nurse testified that, when the will was signed, the decedent was in a dying condition. The decedent had been informed of her general condition by her physician. The nurse understood her critical condition. The attorney had been informed of it, but, in the face of such information, the nurse and the other witness to the will testified that, after the will had been executed, the attorney stood at the foot of the bed with the will in his hand, and he turned to her (the decedent) and he said: "'This is your last will and testament.' She said: 'Yes.' He said: 'You are not entirely satisfied with this will.' She said: 'No.' He said: 'You are going to make another will when you get better, are you not?' She said: 'Yes.'"

It was testified that at six o'clock the deceased said she realized "her time had come," but at the time of the execution of the will she answered "No" and "Yes" to questions by the attorney as to whether she was entirely satisfied with the will and would make another one when she got better. There was no discussion by her and such categorical replies are indeed different from the facts in *Pettit* v. *Pettit*, *No. 1*, 149 App. Div. 485, 490.

On October 29, 1920, one week before she executed the paper writing, she told Mrs. Allen, a friend, a witness called by the proponent, that "Herman has been here and wants me to sign some papers and I told him I would go to his office some time." The paper writing was apparently prepared in October. the word "October" was typewritten in and later

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marked out. Therefore, there were times during which she had no intention of making a will. There is no proof of any direction to make a will and the will was not read to or by the decedent in the presence of the witnesses. There is no proof that the decedent knew its contents. Mr. Schupp, the attorney, was in her sick room alone with her for fifteen minutes preceding the execution of the will. Her answers to the questions attending the formalities of the execution of the will were categorical. Miss Sullivan says she asked for her glasses, which request was from force of habit and would not necessarily indicate the exercise of mental power.

The will was executed a few hours before the death of Matilda E. Burnham. She was confessedly at that time in a very critical condition. During the day she was exhausted and suffered many vomiting spells of fecal matter, there was a stoppage of the bowels due to a disease which was cancerous in its nature and which affected her whole system. See *Matter of Spang, supra.*

The real test of mental capacity has been agreed upon by the great weight of authorities as follows: The testator must have strength and clearness of mind and memory sufficient to know in general without prompting the nature and extent of the property of which he is about to dispose, the nature of the act which he is about to perform, and the names and identity of the persons who are the proper objects of his bounty, and his relation toward them. *Delafield* v. *Parish*, 25 N. Y. 9, 35.

In the instant case, was Mrs. Burnham capable mentally of knowing and remembering who were her relations, or her relationship or responsibility to them? Was she mentally capable of forming a decision as to the disposition of her property, and of

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recollecting her decision throughout the disposition of it? At the time of the testamentary disposition, was the natural intelligence and memory and judgment perverted by disease? Was she in a situation, mentally, to comprehend her relation to this afflicted and helpless son? Was she of disposing mind and memory? Could she comprehend the indirect method of adding to the legacies given in the 3d paragraph of the paper writing which took from her son what was his by force of law?

The jury considered these questions and decided that, when she executed the will, she was mentally incapable of knowing the extent and value of her property, of having a fixed wish and a judgment in the disposition of her property, that disease had so impoverished her memory that she could not collect in her mind without prompting the particulars or elements of the business to be transacted, and to hold them in her mind a sufficient length of time to perceive, at least, their obvious relations to each other. *Matter of Snelling,* 136 N. Y. 515. They were of the opinion that she did not fully understand the provisions of the paper by reason of her physical condition at the time she executed it.

The scene in the sick room does not indicate to the court that she had the clearness of mind, or comprehended the nature of the act which she then had performed, or appreciated its bearings, or knew the natural objects of her bounty, or had an intelligent grasp of affairs, such as the law demands from a person mentally capable to make a last will and testament. The answers to the questions asked her indicate a weakened mind. A mind incapable of understanding the nature of her act and its consequences. *Matter of Spang, supra.* It is significant of her physical condition at the time she executed the will.

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The will being an unnatural one and inconsistent with the duties and obligations of the testatrix, a mother, to the son, it imposed upon the proponents the duty of giving some reasonable explanation of its unnatural character, or at least of showing it was not the result of mental incapacity. In my opinion, they have not done this.

The proponent did not call any expert medical witnesses. The two experts called for the contestant, admittedly experts in mental disorders, in answer to the hypothetical question involving the facts, being largely based upon the charts and the testimony of the nurse, and the other witness to the will, and not based upon an erroneous hypothesis (*Phillips* v. *Phillips,* 77 App. Div. 113, 121; affd., 179 N. Y. 585), testified that the decedent was incapable of understanding the nature of her acts and their consequences, and in effect that she was mentally incapable to make a will. The material witnesses in the case were the nurse, Miss Sullivan, the other witness to the will, and Mrs. Allen, the personal friend of the decedent. The other witnesses for the proponent gave immaterial testimony upon the issue of testamentary capacity, because none of the incidents which they narrated were at or nearer than one week before the execution of the will. They were more or less remote from the time of the execution of the will. They testified that she was rational. Two witnesses failed to state conversations upon which to base an impression of rationality. The family physician saw her at six o'clock P. M. of the day the will was executed and testified she was rational.

Such motions as these are addressed to the sound discretion of the court, involving the inquiry whether substantial justice has been done. *Barrett* v. *Third Avenue R. R. Company,* 45 N. Y. 628. Where the

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evidence is so far contrary to the jury's finding as to indicate the jury must have been influenced by passion, prejudice, partiality or mistake, or that they failed to give proper consideration to the evidence through misapprehension as to its effect, and where it is clear to the court that injustice has been done, it is the duty of the court to set aside the verdict. *Dwight* v. *Germania Life Ins. Co.*, 103 N. Y. 341, 359; *Berkowitz* v. *Consolidated Gas Co.*, 134 App. Div. 389, 391; *Perham* v. *Cottle*, 98 Misc. Rep. 48, 61; affd., 178 App. Div. 949.

In my judgment, the jury's verdict on the question of testamentary capacity is amply justified. It clearly cannot be said the verdict is without evidence to support it, nor can it be said that the verdict indicates passion or prejudice or bias on the part of the jury, and there is no sign that their verdict was affected by other than fair and rational considerations. Surely no injustice has been done.

The proponents have failed to sustain the burden imposed upon them under the decisions and the Code. He who presents a will asserts that the testator was qualified by the statute to make it. *Rollwagen* v. *Rollwagen*, 63 N. Y. 504, 517; *Dobie* v. *Armstrong*, 160 id. 584; *Matter of Kindberg*, 207 id. 220; *Matter of Schreiber*, 112 App. Div. 495; *Matter of Smith*, 180 id. 669, 674; *Matter of King*, 89 Misc. Rep. 638, 649; Code Civ Pro., § 2614. The contestant contends that the verdict upon this issue had ample support in the evidence and it should not be disturbed by the court upon this motion. The court has no right to substitute its opinion for the opinion of the jury upon questions of fact in conflict unless it can be shown that the verdict was rendered by passion, prejudice, mistake or bias, or not supported by evidence. I do not disagree with the jury upon their finding upon the

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issue of testamentary capacity. I feel confident that the verdict as to mental capacity of the decedent is sound, is justified, and is founded upon evidence to support it, and, therefore, should not be disturbed. If there was a retrial, the result, in my opinion, would be the same. This probability must be taken into consideration by the court. *Matter of Spang, supra; Matter of Donohue, supra.* The motion of the proponent is denied.

As to the motion of the contestant. The contestant charged that restraint and fraud and undue influence were exerted upon the decedent and that the verdict upon the issues numbers 5 and 6 is against the evidence and the weight of evidence.

The jury's verdict on this issue is consistent with their verdict upon the issue of testamentary capacity. Should I sustain the contestant's motion, it would be to violate the rule laid down by Mr. Justice Woodward in *Matter of Dunn,* 184 App. Div. 386, 396, wherein he recites that you cannot unduly influence an incapable mind. An allegation of undue influence is inconsistent with an allegation of insanity. *Kinne* v. *Johnson,* 60 Barb. 69; *Matter of Hock,* 74 Misc. Rep. 15, 29; *Matter of Brand,* 185 App. Div. 134; *Estate of Terence O'Brien,* N. Y. L. J., Dec. 29, 1920, Surrogate Foley. Undue influence presupposes someone who in law may be influenced. Whether there may be different degrees of *compos mentis* is questionable. The theory is that the influence must be of a stronger mind upon a weaker sound mental condition. Thus, in the instant case consistency will not, indeed, be sacrificed. The jury having found by their verdict that the decedent did not have a legal mind and that Mrs. Burnham was not unduly influenced, the court has no thought to disturb their ver-

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dict. Consequently, I deny the motion of the contestant.

Submit decree refusing probate to the last will and testament propounded because of the verdict of the jury finding that the decedent was mentally incapable of executing the propounded paper writing.

Decreed accordingly.

Matter of the Final Judicial Settlement of the Accounts of CLIFFORD M. PINCKNEY and FLORENCE P. WEBER, as Administrators of the Goods, Chattels and Credits of EDGAR B. PINCKNEY, Deceased, Trustee Under the Last Will and Testament of THOMPSON PINCKNEY, Deceased.

(Surrogate's Court, Westchester County, June, 1921.)

Surrogate's Court—jurisdiction in the accounting of an administrator of testamentary trustee who died without the county in which will was probated.

The Surrogate's Court of the county where a resident's will was admitted to probate has exclusive jurisdiction of a proceeding for the judicial settlement of the accounts of the administrator of the testamentary trustee who died in another county, where the letters of administration were granted.

PROCEEDING upon the final settlement of administration.

Seacord, Ritchie & Young, for petitioners.

SLATER, S. The will of Thompson Pinckney was admitted to probate on September 24, 1894, by the surrogate of Kings county, as he was a resident thereof at the time of his death. Subsequently Edgar B. Pinckney qualified as a trustee under said will,

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The trustee died and his administrators are now before this court endeavoring to account for the acts of said trustee.

In view of such facts is the trustee accounting in the right court? Many decisions will be found which determine where a foreign trustee shall account, but where a trustee under a resident's will shall account seems never to have been passed upon by our courts.

The jurisdiction of the surrogate is the creation of statute and, if not conferred upon him, does not exist. His jurisdiction over the accounting of a testamentary trustee had its origin in chapter 272 of the Laws of 1850. Thus for the first time the statute stated where a testamentary trustee could voluntarily account, to wit: before the surrogate of the county in which the will was proven. This continued to be the law until the Code of 1880 was adopted. Section 2802 thereof substantially followed the law of 1850 and allowed a trustee to file his account before the surrogate "having jurisdiction of the estate" (changed in 1885 to read "of the estate or trust"). The estate referred to is the estate from which the trust was carved. Judge Andrews in *People ex rel. Safford* v. *Surrogate's Court of Genesee County, N. Y.*, 229 N. Y. 495. This being the only provision defining the surrogate before whom such proceedings could be had the limitation still remained that the Surrogate's Court where the will was admitted to probate might take the accounting voluntary or involuntary. In 1914 the Code was revised as to surrogate's practice. This revision "put testamentary trustees in the same category with executors, administrators and guardians in respect to qualifying, removal, control, accounting, etc." Jessup-Redfield, Surr. 1255. Sections 2721, 2723, 2753, 2569 outline procedure from which one must conclude that such

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proceedings must be brought before the surrogate "having jurisdiction." This can only be interpreted as being the surrogate having jurisdiction "of the estate or trust." The Surrogate's Court where the will is probated has exclusive jurisdiction. Code Civ. Pro., §§ 2514, 2515. The Surrogate's Court before which the trustee qualified has exclusive right to remove him. Code Civ Pro., § 2569. Subdivision 3, section 2510, gives the surrogate power to direct and control the conduct and settle the accounts of testamentary trustees and to remove trustees and appoint their successors. It can hardly be reasoned that a certain court has exclusive jurisdiction to remove a trustee and yet any Surrogate's Court can settle his account. The residence of a trustee cannot be the determining fact as to where he shall account, for to reason so would bring about a serious condition in our public records. Assume a preacher to be a trustee and the custom of his church cause him to be assigned to a new parish every year or so, which parish might well be in different counties. His accountings might well be spread upon the records of many Surrogate's Courts in this state. This would lead to confusion and an added burden on those interested in the trust. If a person interested was not cited it would cause him to search in all the Surrogates' Courts of our state before he could find the one in which he would have to apply for relief. The scheme of our law is to confine matters of one estate to the court having original jurisdiction. This has always been the intention of the law and it was the intention of the revisers when in 1914 they gave added power and jurisdiction to Surrogates' Courts. Section 2514 of the Code clearly shows the intent of the legislators. My attention has been called to *Matter of Hoyt*, 103 Misc. Rep. 614, but the facts there

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came within a specific statute, and I do not deem it in any sense controlling the facts now before me.

Therefore, I shall decline to entertain the petition, for lack of jurisdiction.

Decreed accordingly.

STONEWARE ELECTRIC STOVE WORKS, Plaintiff, *v.* WILLIAM M. BARRETT as President of the Adams Express Co., an Unincorporated Association Consisting of Seven Persons, Defendant.

(City Court of the City of New York, Special Term, June, 1921.)

Motions and orders—examination of third person in supplementary proceedings unauthorized—void Municipal Court judgment—Municipal Court, city of New York, Code, §§ 6(7), 129; Rule 9.

Where upon granting a motion in the Municipal Court to restore a cause marked "reserved generally" to the trial calendar as required by rule 9, Municipal Court Rules, no formal order is made and entered, the defendant, by not appearing on the day an inquest was taken, is neither guilty of neglect or omission and is not in default.

The judgment so rendered in the absence of the defendant was therefore void, and an order for the examination of a third person in proceedings supplementary to execution issued upon the transcript of said judgment, which was filed a year and four days after the original entry of judgment, is unauthorized and will be vacated and set aside, even though a motion by defendant under section 6(7) of the Municipal Court Code, to vacate and set aside the judgment as unauthorized and void, was denied on the ground that under section 129 of said Code the motion should have been made within a year after the original entry of judgment.

MOTION to vacate and set aside an order for the examination of a third party.

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Stockton & Stockton (George M. Billings, of counsel), for motion.

Kamen & Ostertag (Bernard I. Kamen, of counsel), opposed.

FINELITE, J. This is a motion to vacate and set aside an order for the examination of a third party which it is claimed has property of the judgment debtor. The judgment upon which these proceedings supplementary to execution are instituted was rendered in the Municipal Court upon the non-appearance of the defendant at Trial Term. Said cause had been noticed for trial; was later marked "reserved generally." Thereafter and on or about March 16, 1920, the judgment creditor here (the plaintiff there) served a notice for an order restoring the case to the trial calendar. It seems that on the return of said notice the justice of the Municipal Court before whom the same came on to be heard indorsed on said notice the following: "Motion to restore is granted on default and case is set for April 9, 1920. F. J. C., Jr." No formal order was made or entered. An inquest was taken on April 6, 1921, on the non-appearance of the defendant and judgment entered in said Municipal Court on that day, and a transcript of the judgment was filed in the county clerk's office, New York county, on April 20, 1921, one year and four days after the original entry of the judgment. Defendants claim that they knew nothing of the disposition of said notice to restore the cause to the trial calendar in that they were not served with any order of the court's direction in that particular, and were first apprised of the existence of any judgment on or about April 21, 1921, when they received notice from the sheriff that he held an execution to be levied

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upon their property. Thereupon they moved to vacate and set aside said judgment on the ground that it was void, that the judgment was unauthorized and that the court had no right to render judgment against the defendant. Said motion was made under subdivision 7, section 6, of the Municipal Court Code. Said motion was denied, the grounds given being that under section 129 of the Municipal Court Code motions to open default must be made within a year after the date of entry of judgment. Defendant's practice now is to arrest the collection or enforcement of said judgment if he be remediless to vacate it. Such practice is proper in the circumstances, as the defendant may treat the judgment as a nullity and attack its enforcement if such enforcement be attempted. *Clarrisio* v. *Coney Island & B'klyn R. R. Co.*, 104 Misc. Rep. 592. Whether or not the judgment may be regarded as a nullity so far as its enforcement is concerned depends upon the answers to the propositions as to whether or not the case was properly placed on the calendar and the power of the court to render judgment for the plaintiff in the absence of the defendant. And the conclusions there to be reached depend upon whether said justice in the circumstances should have entered an order restoring the cause and the defendant received proper notice thereof. Causes marked "reserved generally" are restored to the trial calendar of the Municipal Court by virtue of rule 9, Municipal Court Rules, which provides for the restoration of such causes on three days' notice or on consent of the parties for a day to be fixed by the court. It will be noted that the notice by plaintiff to thus restore the cause specifically notified defendant that plaintiff would apply for an order, and defendant was justified in assuming that if plaintiff was successful in obtaining the relief sought

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the order thus obtained would be served on him. In *Garrison* v. *Barrett,* 176 N. Y. Supp. 19, it was held that to carry into effect said rule 9 the entry of an order is necessary, and that rule 33 of the Municipal Court requires that where both parties have appeared by attorneys copies of all papers which are required to be filed with the clerk shall be served upon the attorney for the adverse party, with notice of filing, within one day of the date of such filing. Defendant received no notice of any determination of the court. The indorsement upon the notice is not an order of the court. *Kirschner* v. *Abbott's Bakeries,* 92 Misc. Rep. 402; *Shames* v. *Barrett,* 166 N. Y. Supp. 756. This case could only have been restored to the calendar by order of the court. No order having been made or entered, the case improperly appeared upon the calendar, and the judgment entered upon default was void. *Rethy* v. *Orszag,* 102 Misc. Rep. 540. As was said in the *Clarrisio Case, supra:* "The judgment was of no more force and effect than if it had been taken on date for which the trial had not been noticed or to which date it had not been adjourned." The conclusion must here be reached that the defendant by not appearing in said Municipal Court on the date the inquest was taken against it was guilty of no neglect or omission and was not in default. The judgment rendered was void, and the attempt to enforce its collection by supplementary proceedings in this court is without warrant, and the order herein by a justice of this court made on June 3, 1921, directing the examination of the Chase National Bank as a third party must be vacated and set aside.

Ordered accordingly.

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ISAAC LEVINE, Appellant, *v.* BERNHARD SUSSER, Respondent.

(Supreme Court, Appellate Term, First Department, November, 1920, Term — Filed June, 1921.)

Brokers (real estate)—valid contract for commissions — when broker not employed in a confidential capacity by two opposing interests.

Where there is nothing in an agreement between a real estate broker and an intending purchaser, as pleaded or testified to, whereby the broker bound himself not to disclose to the seller the fact that he was to receive a commission from the other party, the contract is valid on its face.

Defendant agreed to purchase certain real estate at the price asked, only through plaintiff as broker, and that if he did not so purchase or if plaintiff did not receive a commission from the seller, defendant would pay plaintiff such commission. The plaintiff having received no commission from the seller upon a sale made within the purview of the terms of the contract brought an action in which he testified that defendant said to him: "If you bring me some property I like, I will buy it quick through you and you get the commission. Even if I buy the property through other brokers and you don't get the commission from the owner, the other side, I will pay from my own pocket the commission." *Held,* that the contract could not properly be construed as subjecting plaintiff to employment in a confidential capacity by two opposing interests, and a judgment entered upon a dismissal of the complaint at the close of plaintiff's case will be reversed and a new trial granted.

Mullan, J., dissents.

APPEAL by plaintiff from a judgment of the City Court of the city of New York in favor of plaintiff, entered upon a dismissal of the complaint at the close of plaintiff's evidence.

Jacob Manheim, for appellant.

Barnett E. Kopelman, for respondent.

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BIJUR, J. The complaint alleges that plaintiff was a real estate broker and agent; that defendant requested that he find properties for the defendant to purchase and to secure the asking price and terms; that defendant agreed that he would purchase these properties only through plaintiff as broker, and if defendant did not purchase such properties through plaintiff, or if plaintiff did not receive the commission on the sale from the seller, defendant would pay the plaintiff such commission. It is then alleged that a sale took place within the purview of the terms of this contract; that plaintiff did not receive a commission from the seller and that defendant refused to pay the same to him.

Plaintiff's testimony as to the contract was that defendant said to him: "If you bring me some property I like, I will buy it quick through you and you get the commission. Even if I buy the property through other brokers and you don't get the commission from the owner, the other side, I will pay from my own pocket the commission."

The motion to dismiss, which was granted, was to the effect "that it appears from the plaintiff's own testimony that the plaintiff was serving two masters. That he was under an agreement with the Wally Contracting Company (the seller) to secure a purchaser, and that he undertook that employment without disclosing the agreement he had with the prospective buyer. * * * We have it from the testimony of the plaintiff himself that he was serving two masters at the same time; and he could not faithfully perform his duty to either one or the other; and such a contract as alleged here, without being disclosed to the other party, places him in the position of assuming incompatible duties, and constitutes a contract against public policy, and is absolutely void."

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It is to be observed that there was nothing in the agreement as pleaded or as testified to whereby the plaintiff bound himself not to disclose to the seller the fact that he was to receive anything from the defendant. The contract was, therefore, on its face perfectly lawful. If we may indulge in any presumption it must be that the parties intended a lawful agreement, and if it be capable of two constructions, the one which indicates its validity must be adopted. As to the mode of executing the contract, plaintiff was not asked, either by his own counsel or the defendant's counsel, whether he had actually disclosed the agreement to the seller. The statement in the motion to dismiss, therefore, that he had not disclosed the agreement to the seller was a pure assumption on the part of defendant's counsel. I am cited by the respondent to no authority which places upon one party to a contract legal on its face the burden of excluding by proof the existence of all possible circumstances which might render the contract illegal in the mode of its execution.

If, however, we might hazard a guess that the plaintiff had not disclosed his agreement with the seller, we come to what may be regarded as the more substantial consideration, *i. e.*, that the contract is in any event valid because it called for the exercise of no discretion by the plaintiff on behalf or in the interest of the defendant. If plaintiff's version be accepted, defendant was desirous only of learning of opportunities to make good investments in the purchase of real estate and offered to plaintiff certain inducements in case he brought such investments to defendant's notice. Respondent's counsel seems to have sensed some such element in the contract because he was at pains to cross-examine plaintiff at great length in regard to the manner of conducting business as a

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broker, questioning him frequently as to whether it was not his duty on behalf of the seller to get the highest price possible and on behalf of the buyer to secure the property at the lowest price to which in substance plaintiff replied in the affirmative. Whether, however, this evidence be regarded as relating to the business of a real estate broker generally or as stating what plaintiff thought his duties might be under the agreement in question, it could not affect the very plain terms of that agreement, interpreted and illustrated as they were by what actually occurred in the transaction out of which the instant claim arises. It is clear to my mind that the agreement did not contemplate that plaintiff should use his efforts to secure terms for the buyer, defendant, and in fact he did not do so, but insisted, as suggested by the seller, that defendant should himself see the latter and negotiate the transaction to a close himself.

The difficulty of representing in the same transaction two employers with conflicting interests and the unlawfulness of an agreement to do so in the absence of a full disclosure of the situation to both parties is well discussed in *Empire State Ins. Co.* v. *Am. Central Ins. Co.*, 138 N. Y. 446, 449. Even where the broker is employed to exercise his discretion as to both parties their knowledge of all the facts will cure the vice. *Knauss* v. *Krueger Brewing Co.*, 142 N. Y. 70, 77. That case, however, and many others, point out that the contract is perfectly sound as within public policy whether a disclosure be made or not if the so-called broker is not called upon to exercise his discretion in the transaction. It seems to me to be a plain corollary of that proposition that even though his relation to one party be such as to require him to exercise his discretion on behalf of that one, if as to the other he is a pure intermediary without the duties of a

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fiduciary, the contract is valid. Indeed, an example of a valid contract of that very character is cited in *Dickinson* v. *Tysen*, 209 N. Y. 395, 400, except that the roles are changed from those in the instant case to the extent that it is to the seller rather than, as in this case, to the buyer that the broker is free from the obligation to exercise such discretion. Since, therefore, the contract in the instant case cannot properly be construed as subjecting the plaintiff to employment in a confidential capacity by two opposing interests, the judgment must be reversed and new trial granted with costs to appellant to abide the event.

MULLAN, J. (dissenting). The plaintiff had submitted to defendant various parcels, and defendant was not interested in any of them, and plaintiff finally discontinued his efforts to interest defendant. Later the parties met accidentally, and defendant asked plaintiff if plaintiff had any properties to submit. Assuming as we must, the truth of plaintiff's story, plaintiff said to defendant: "I gave you so many good properties at reasonable prices, and you did not buy any of them, and I have been bothering with you for over two months; what is the use of bothering with you. * * * If I bring you some good property you can buy yourself through other brokers and I don't get commission," and defendant replied; "If you bring me some good property I like I will buy it quick through you, and you get the commission. Even if I buy the property through other brokers and you do not get the commission from the owner,—from the other side,—I will pay you from my own pocket the commission." Plaintiff subsequently submitted the property involved in this action, the owner and proposed seller being either the Krausman Realty Company or the Dixie Security Company. While defend-

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ant was considering, the property was sold by plaintiff's original employer to the Wally Contracting Company. Plaintiff had been employed by the original seller through a Mr. Posner, who knew that defendant was plaintiff's prospective customer. Plaintiff procured the authorization of the Wally Contracting Company to represent it to effect a sale, the Wally Company being represented by one Wacht. Plaintiff's dealings with Wacht show plainly that plaintiff was the seller's broker. Wacht gave plaintiff an asking price of $142,000, revealing to him, however, that the deal could be closed at $138,000. There is no evidence that plaintiff told Wacht he was an employee of the buyer, and, on the other hand, there is evidence that Wacht did not even know the name of the buyer, but knew merely that plaintiff had a possible buyer who was a possible buyer when Posner's company was plaintiff's employer. Plaintiff went to defendant and, in violation of the duty he owed the seller of endeavoring to procure the highest price possible, never mentioned to defendant the asking price of $142,000, but told defendant that the owner wanted $138,000, and then immediately, and without any solicitation on the part of defendant, he told defendant that it was his opinion that the property could be bought for even less than $138,000.

My learned brethren hold the view that no skill was required of plaintiff by either the owner or the defendant, and that no discretion was vested in him. I am of the opinion that it very plainly appears that his skill was relied upon, and that he was given a very large measure of discretion. He had procured from Wacht maximum and minimum prices that were $4,000 apart. His duty to the owner was to obtain the best price procurable between $138,000 and $142,000. Such skill as he possessed should have been employed in

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inducing the buyer to accept the largest figure within the limits of the discretion given him. Plaintiff's judgment should have been employed in determining how high the buyer would go. He betrayed the trust reposed in him by Wacht by making not the slightest effort to obtain a higher price than the minimum figure that had been named to him. Thus, he deliberately refused to put to use such skill and judgment as he possessed in a situation calling for the exercise of both. The actual holdings in the *Empire State Ins. Co.* and *Knauss* cases, cited by Mr. Justice Bijur, are not in point, nor do the *dicta* in the opinions in those cases exclude the requirement of good faith. If a broker is employed, in a given case, as a mere introducer, of course his duties are limited to the introduction. Otherwise, a broker is bound, as is any other employee, to the utmost of good faith in the interest of his employer. Here, he was at least false to the seller. This, I think, is plainly the case referred to in the Knauss opinion, "where by possibility his (the broker's) duty and his interest might clash." In his anxiety to procure a commission, the plaintiff gave to the defendant the benefit of an offer at a sum considerably less than the defendant may have been willing to pay. I think the situation calls for the application of the rule that has been tersely stated as follows: "It is unlawful for him (the broker) to attempt to act in the capacity of broker for both sides to a negotiation without the knowledge and consent of each of them, and in the event of his so doing he is not entitled to be compensated by either. * * * if the knowledge and consent of but one is obtained and the other is kept in ignorance of the dual employment there can be no recovery, not even as against the one assenting." 4 R. C. L. 328, ¶ 64, and cases cited; *Leathers* v. *Canfield*, 45 L. R. A. 33, and note. It seems to me to be of no

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materiality that the agreement sued upon here contains no express term that plaintiff should not reveal to the seller the dual capacity in which he was acting. The question is whether he in fact acted in that dual capacity with the full knowledge of both parties of all the facts. That he did not disclose to the seller his agreement with the defendant is beyond doubt.

I am of the opinion that it amply appeared, out of plaintiff's own mouth, (1) that skill and judgment were required of him, (2) that he failed to employ such skill and judgment, and (3) that he acted in bad faith toward the seller, one of his employers. I vote, accordingly, for affirmance.

Judgment reversed and new trial granted, with costs to appellant to abide event.

EMIL LARSCHEN, Respondent, *v.* ISADORE LANTZES, Appellant.

(Supreme Court, Appellate Term, First Department, April Term — Filed June, 1921.)

Negotiable instruments — check given for gambling debt void — Penal Law, § 993.

A check given in payment of a gambling debt is utterly void under section 993 of the Penal Law, and a judgment rendered in an action thereon in favor of a holder in due course will be reversed and the complaint dismissed, but with leave to appeal.

APPEAL by defendant from judgment of the Municipal Court of the city of New York, borough of Manhattan, sixth district, in favor of plaintiff.

Paul Rude, for appellant.

No appearance for respondent.

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GUY, J. In this action against maker of check given to pay sixty dollars lost in playing at cards, the evidence authorized the finding that the plaintiff is a holder in due course, and the court awarded him a recovery.

The undisputed evidence of both the maker and the payee of the check is that the check was given in payment of a gambling debt.

Appellant contends that as our statute makes a check given to pay a gambling debt void, a recovery, even in a suit by a holder in due course, is not warranted.

By the provisions of the Penal Law all wagers, bets, or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot, chance, casualty, or unknown or contingent event whatever, are declared unlawful (§ 991); all contracts for or on account of any money or property or thing in action so wagered, bet or staked, are void (§ 992); and "all things in action, judgments, mortgages, conveyances, and every other security whatsoever, given or executed, by any person, where the whole or any part of the consideration of the same shall be for any money or other valuable thing won by playing at any game whatsoever * * * shall be utterly void." § 993.

Although I find no prior adjudication in this state making an instrument given in payment of a gambling debt void in the hands of a holder in due course, in view of the decision of the Court of Appeals in *Sabine* v. *Paine,* 223 N. Y. 401, that our statute declaring usurious instruments void is not repealed expressly or by implication by the Negotiable Instruments Law, so that a note void in its inception for usury is void in the hands of an innocent holder for value, the conclusion seems inevitable that the same rule applies to instruments or "things in action" which by another

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statute are declared to be "utterly void." As the court said in the case cited (223 N. Y. 404): "An instrument which a statute, expressly or through necessary implication, declares void, strictly speaking, is a *simulacrum* only. It is without legal efficacy. It cannot obligate a party or support a right." Or as the judge writing the opinion of the court in the *Sabine* case says in a subsequent case (*Lipedes* v. *Liverpool & L. & G. Ins. Co.*, 229 N. Y. 201, 209), "it is a general rule of interpretation that contracts declared in terms void by statute because interdicted by law or by public policy are, in the correct and true meaning of the word, void."

Among the cases cited by our Court of Appeals in support of its decision in the *Sabine* case, is *Alexander & Co.* v. *Hazelrigg*, 123 Ky. 677, wherein the Court of Appeals of Kentucky held that the statute of that state making gaming contracts void, prevented a recovery by an innocent holder against the maker of a note given in payment of a bet or wager upon the result of a horse race. A number of other cases decided in accordance with local statutes in different states are referred to by Williston in his work on Contracts (Vol. 3, § 1676, note), although the text writer states that "The tendency of the modern law in regard to instruments illegal because based on a gambling consideration is to protect the holder in due course."

It follows that the judgment must be reversed, with thirty dollars costs and the complaint dismissed, with costs, with leave to respondent to appeal to the Appellate Division, first department.

WHITAKER, J., concurs.

Judgment reversed, with thirty dollars costs.

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TOMMASO GIORDANO, Landlord, Respondent, *v.* MORRIS ZAP and another, Tenants, Appellants.

(Supreme Court, Appellate Term, First Department, June, 1921.)

Landlord and tenant — notice of renewal under terms of lease — landlord in foreign country — summary proceedings.

A lease containing an option of renewal providing the tenant ninety days previous to December 1, 1920, when the lease would by its term expire, gave notice of his desire to procure the new lease, was assigned by consent of the landlord and said assignees on August 16, 1920, by a postpaid letter which though directed to the landlord at a wrong address he did not deny having received, elected to renew the lease. The landlord, for forty-five days more than ninety days next preceding the expiration of the original lease, was in a foreign land. *Held,* that a final order in summary proceedings against the assignees of the lease as holdovers will be reversed and a new trial granted.

APPEAL by tenants from a final order of the Municipal Court of the city of New York, borough of The Bronx, first district, in favor of the landlord, after a trial by a judge without a jury.

Maxwell Cohen, for appellant.

Charles P. Hallock, for respondent.

BIJUR, J. The tenants as assignees of a lease, which by its terms expired December 1, 1920, of premises used for business purposes, have been dispossessed as hold-overs. The assignment was consented to by the landlord. The lease contained the provision: "The tenant is hereby given an option of a lease upon said premises for an additional term of five years at the expiration of the term of this lease at the rental of $125 per month to contain covenants and agreements the same as this lease except as to the amount of rent

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and the term provided the tenant shall give the landlord 90 days notice in writing previous to the expiration of this lease of his desire to procure such new lease."

It was proved without objection that the landlord was in Italy from the middle of July until after December 1, 1920. Tenants' counsel testified that on August 16, 1920, he wrote and mailed to the landlord a letter reading: " Please take notice that my clients Messrs. Zap & Harnik, tenants of your premises on 180th street and Honeywell Avenue, Bronx, hereby elect to renew the lease dated November 1st, 1915 wherein Tillie Feldman is tenant, and said lease assigned to my clients on January 6th, 1920, pursuant to the option contained in lease."

This letter was directed to 783 East One Hundred and Eightieth street. The landlord's address appears to have been 864 East One Hundred and Eightieth street. The tenant's attorney testified, however, that the imprint of his name and office address was on the envelope and that the same was not returned to him by the postoffice although full postage had been affixed thereto. The landlord did not even deny the receipt of the letter.

As I understand the respondent's position on this appeal, it is that under the provisions of the lease, and upon the authority of *Beakes* v. *Da Cunha,* 126 N. Y. 293, 297, the only notice available to the tenants is personal notice. The general ruling to that effect to be found in the *Beakes* and similar cases, must be accepted as established, unless of course a difference in the provisions requiring the notice or the circumstances of the case exhibit a different intention. It is not important to determine whether the act of the landlord in leaving this country for Italy and remaining absent for a period forty-five days greater than

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the ninety days preceding the expiration of the term, is to be regarded as an interpretation of the lease to the effect that a written notice in ordinary course would satisfy this requirement or as a waiver of the requirement of personal notice. In any event, it is clear that the landlord could not have anticipated that under the circumstances the tenants must discover his whereabouts in Italy in order to give him the notice required.

Final order reversed and a new trial granted, with thirty dollars costs to appellants to abide the event.

DELEHANTY and FINCH, JJ., concur.

Final order reversed and new trial granted, with thirty dollars costs to appellants to abide event.

BROADWAY-JOHN STREET CORPORATION, Landlord, Respondent, *v.* HUYLER'S, Tenant, Appellant, VACUUM CLEANER SPECIALTY CO., INC., Tenant.

(Supreme Court, Appellate Term, First Department, June, 1921.)

Landlord and tenant — purchaser of property from landlord cannot, before taking title, take advantage of a cancellation clause in the lease — summary proceedings.

A six months' notice to a tenant to remove from the premises by one not having title thereto does not operate to cancel the lease or require the tenant to quit the premises.

A lease provided that if within five years from May 1, 1906, the tenant did not exercise his privilege under the lease to tear down the building and erect a new one in its place, the landlord should have the right to cancel the lease upon giving a six months' written notice effective at the expiration of the term and upon payment of a certain sum of money. Neither of the parties took any action under the lease. *Held,* that a six months' written notice to quit given to the tenant by the land-

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lord's grantee of the premises, prior to taking title, in its own name, was insufficient, and a final order in a summary proceeding awarding said grantee possession of the premises will be reversed on the ground of failure to give the notice required by law.

APPEAL from a final order of the Municipal Court of the city of New York, borough of Manhattan, ninth district, awarding plaintiff possession of certain premises in the borough of Manhattan.

Roger Hinds (Edward F. Clark, of counsel), for appellant.

Alfred J. Wolff, for respondent.

DELEHANTY, J. The tenant herein occupied certain premises at 133 West Forty-second street in the city of New York under a lease which provided that within five years from the 1st day of May, 1906, it should have the privilege to tear down the building on the premises and erect a new one in its place, but if it did not exercise the privilege, within the time specified, the landlord shall thereafter have the right upon giving six months' notice in writing, and upon payment of $10,000 to cancel the lease for the purpose of erecting said building on the premises.

Upon the trial it appeared that both parties to the lease failed to take any action under the foregoing provisions. It did appear, however, that the landlord entered into a contract for the sale of the premises, and that the purchaser thereof, the plaintiff herein, on October 29, 1919, prior to taking title, gave written notice in its own name to the defendant to remove at the end of six months, effective May 1, 1920. The court below has held that this notice was sufficient, and has granted the final order applied for. Such order, however, cannot be sustained.

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When plaintiff gave notice to remove it had not yet taken title to the premises, and under the law of this state, such notice did not operate to cancel the lease or require the tenant to quit the premises. In a similar situation the Court of Appeals in the case of *Reeder* v. *Sayre,* 70 N. Y. 180, said: "And now comes the query, whether Sayre, being only the vendee by contract, and not having yet a legal title to the land, could give a notice to quit which would operate to affect the rights of the Reeders (the lessees) * * * Sayre (lessor's vendee) did give notice to quit, sufficient in form and substance, if he had a right to give that notice. But he was not, until after the day last named, the owner of the legal title. Before that he had but an equitable title, which might or might not become a legal title. * * * The tenant is to act upon the notice at the time it is given; hence it ought to be such a one as he can act upon with safety. * * * The equitable owner of the title cannot give such a notice."

Other authorities to the same effect are *Scheele* v. *Waldman,* 136 App. Div. 679; *Stoddard* v. *Winter Realties, Inc.,* 179 N. Y. Supp. 741, 743; *Griffin* v. *Barton,* 22 Misc. 228; 2 Tiffany Landl. & Ten. § 198, p. 1438.

There are other points raised by counsel for consideration herein, but in the view that we take of this matter, it is unnecessary to discuss them. We prefer to rest our decision herein upon the failure to give the notice required by law.

Order reversed, with thirty dollars costs, and petition dismissed, with costs.

FINCH, J., taking no part; BIJUR, J., concurs.

Order reversed, with thirty dollars costs.

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EMANUEL L. ROSING and ano., Appellants, v. PARKSIDE MILLS, INC., Respondent.

(Supreme Court, Appellate Term, First Department, June, 1921.)

Sales — goods to be manufactured — delivery in installments — whether contract divisible question for jury — Personal Property Law, §§ 125(3), 126(2), 156.

Where upon a sale of seventy-five pieces of goods to be manufactured the purchaser accepts delivery of fifty-nine pieces and rejects the remainder as defective and returns them to the seller who accepts such return and issues its credit memoranda therefor, the dismissal of the complaint in an action to recover damages alleged to have been sustained by reason of the seller's refusal to replace the defective pieces at the contract price, is error for which the judgment entered upon the dismissal of the complaint will be reversed and a new trial granted.

Under the Personal Property Law (§§ 125(3), 126(2) and 156) a jury would have the right to determine whether the contract was divisible and to fix the damages sustained by reason of the delivery of the defective goods.

APPEAL from a judgment of the City Court of the city of New York, dismissing the complaint at the end of the plaintiffs' case.

Gordon, Tally & Gordon (Reuben Tally and David Kraus, of counsel), for appellants.

Kleiner, Britwitz & Nadel (Lewis Nadel and Joseph Kleiner, of counsel), for respondent.

DELEHANTY, J. Plaintiffs are engaged in the manufacture of suits and coats and the defendant in the manufacture of woolen cloth. On April 30, 1919, the former placed a written order with defendant for seventy-five pieces of its silvertone cloth, each piece to average fifty-five yards, at the agreed price of three

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dollars and thirty-seven and one-half cents per yard. The goods were to be delivered in installments during the months of May, June, July and August.

As a matter of fact they were delivered from time to time up to and including December, 1919. The goods delivered in June and July conformed to the contract and were accepted and made into garments by plaintiffs. One of the pieces delivered in August was defective and was returned to the defendant. Thereafter other pieces were found defective and also returned. Of the seventy-five pieces contracted for, fifty-nine were accepted and made into garments, and sixteen were rejected as defective and returned to the defendant. This action was instituted to recover damages sustained by the plaintiffs by reason of the defendant's refusal to replace the sixteen defective pieces at the contract price. The court below dismissed the complaint at the close of plaintiffs' case with this statement: "The common law that the purchaser of merchandise may not reject part of a shipment of merchandise and accept the remainder has not been changed. This is still the law, notwithstanding Sections 125 and 156 of the Personal Property Law. The purchaser must either accept or reject all. Such has always been the law and has only recently been followed in the case of *Portfolio* v. *Rubin*, 110 Misc. Rep. 303. Motion to dismiss the complaint must therefore be granted."

Since the trial of the action the *Portfolio* case referred to by the learned court below has been reversed by the Appellate Division of this department (*Portfolio* v. *Rubin*, 196 App. Div. 316), whether upon this particular point is immaterial. A review of the authorities discloses that under the circumstances presented, it was error to grant the motion to dismiss. The defendant accepted the return of the

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sixteen pieces of goods in question and issued its credit memoranda therefor. There is no evidence that it claimed the right to have all the seventy-five pieces accepted or rejected.

In the *Portfolio Case, supra,* the Appellate Division pointed out at page 304 that, "Prior to the enactment of the Personal Property Law it was the rule of the common law as administered in this jurisdiction that where a single contract of sale was divisible, as where it embraced different kinds or grades of goods at specified prices for each, the goods of one kind or grade might be accepted and others rejected by the buyer, in the absence of evidence that the prices were fixed with reference to the entire quantity. *Pierson* v. *Crooks,* 42 Hun, 571; affirmed, 115 N. Y. 539; 22 N. E. 349; 12 Am. St. Rep. 831. But there was no definite rule by which it could be readily decided whether a single contract was or was not thus divisible, and it was held that it depended on the intention of the parties, and often became a question of fact. *Clark* v. *West,* 137 App. Div. 23; 122 N. Y. Supp. 380; affirmed, 201 N. Y. 569; *Equitable Trading Co.* v. *Stoneman,* 131 App. Div. 376. See, also, *Shinn* v. *Bodine,* 60 Penn. 182; 100 Am. Dec. 560."

The right of defendant to replace the rejected goods was never questioned. On the contrary plaintiff sought delivery thereof. Furthermore the case is not to be regarded as falling within the rules that are applied when but one shipment of goods is made. Here the deliveries were to extend over a period of months and payments were to be made for each installment according to deliveries. There is no evidence from which it can be inferred that the agreement of the parties contemplated that the plaintiffs must accept all or reject all and under the facts presented a jury might reasonably infer quite the contrary. There was ample

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evidence requiring the submission of the case to the jury under the rules of the common law, and it seems that under the provisions of the Personal Property Law, section 156, section 126, subdivision 2, and section 125, subdivision 3, a jury would have the right to determine whether or not the contract was divisible, and to fix the damages sustained by reason of the delivery of the defective goods referred to in this case. Appellant urges certain defects in the pleading. The matter was not referred to in the court below, and the issue was tried as presented. It is too late too raise the point for the first time on appeal, as has been frequently decided in this court. Judgment reversed and new trial granted, with costs to appellants to abide the event.

BIJUR and FINCH, JJ., concur.

Judgment reversed and new trial granted, with costs to appellants to abide event.

CHARLES E. BENEDICT, Appellant, *v.* MARIE FLANNERY, ETC., Respondent.

(Supreme Court, Appellate Term, First Department, June, 1921.)

Infancy is not a defense to an action in replevin to recover an engagement ring given by plaintiff to defendant.

APPEAL from a judgment of the city court of the city of New York, dismissing plaintiff's complaint at the close of plaintiff's case.

David Wills (J. M. Cohen, of counsel), for appellant.

John P. Everett, for respondent.

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FINCH, J. The plaintiff sues in replevin for the recovery of a diamond ring given by the plaintiff to the defendant while they were engaged to be married. The plaintiff testified: "I said to her that the ring was not an engagement ring, that I would change it and have a Tiffany setting made out of the center stone, or I would give her a different engagement ring." Before this conversation the plaintiff, after they had become engaged, first asked the defendant if she would wear his ring, and her answer was "no." Shortly after that he handed her the ring and she took it and wore it, neither of the parties saying anything at the time that this took place. Thereafter the defendant broke the engagement, and has refused to return the ring.

In passing on the motion to dismiss, the court, among other things, said: "I think the testimony of the plaintiff makes this a bailment, and that makes the question rather more difficult." The court granted the motion to dismiss upon the ground that the defendant was under twenty-one years of age, and hence as an infant was not liable in this action. The learned court below apparently confused the distinction between holding an infant in damages and in an action in replevin. The respondent relies upon the case of *Stromberg* v. *Rubenstein*, 19 Misc. Rep. 647; but the facts in that case show that the infant had disposed of the diamond, and as the court there expressly pointed out "it does not appear that she still has the proceeds. She has the ring setting; but as its value apart from the stone has not been established, the judgment cannot be modified as to the setting alone even if a recovery to that extent could be sustained against an infant," and the court set aside the judgment but ordered a new trial.

In the case at bar, the defendant has the ring, and

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while infancy is a bar under certain circumstances to a suit for damages, yet it cannot be pleaded as a shield to prevent the return of another's property. *Wheeler & Wilson* v. *Jacobs*, 2 Misc. Rep. 236.

BIJUR and DELEHANTY, JJ., concur.

Judgment reversed and new trial ordered, with costs to appellant to abide event.

HENRY H. DREYER, Appellant, *v.* ROSCOE M. WIERS, Respondent.

(Supreme Court, Appellate Term, First Department, June, 1921.)

Landlord and tenant — recovery of possession of apartment for use of landlord and family — demand must be in good faith — Laws of 1920, chap. 942.

In a proceeding to recover possession of a tenant's apartment on the ground that it was to be used forthwith for the landlord and his family, the only condition imposed by the statute (Laws of 1920, chap. 942) is that the demand for possession must be made in good faith.

A final order granting a motion to dismiss the proceeding unless the landlord agreed to exchange apartments with the tenant is unauthorized and will be reversed and a new trial ordered.

APPEAL by the landlord from a final order of the Municipal Court of the city of New York, borough of Manhattan, seventh district, reading as follows: "Motion to dismiss granted unless the landlord agrees to exchange apartment with tenant, latter to pay $110 for the seven room apartment, after trial."

Isaac Hyman, for appellant.

Spoor & Russell (Wm. E. Russell, of counsel), for respondent.

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FINCH, J. The proceding was brought by the landlord to recover possession of the apartment on the ground that the same was to be used forthwith by himself and family, in accordance with the provisions of the statutes familiarly known as the Housing Laws (Laws of 1920, chap. 942). The landlord occupied a seven-room apartment in the same building, but as his family was about to be reduced in size by the marriage of his daughter and his wife was too old and infirm to alone care for the larger apartment, the landlord desired to obtain the five-room apartment occupied by the tenant.

The court declined to consider the question of the good faith of the landlord's demand, holding that it was not the intention of the legislature to permit any choice of apartments to a landlord occupying an apartment in the same house.

In this the learned court was in error. The only condition imposed by the legislature to the right of possession of a landlord who desires the premises for his personal occupancy is that such demand is made in good faith. It is not to be presumed that the legislature intended to place any greater restrictions upon the usual rights incident to ownership than provided by the language used. If the landlord in good faith desired to occupy for himself and his family the apartment in question, the court below was without authority to impose as a condition that the landlord permit the tenant to occupy the larger apartment at the rent fixed.

It follows that the order should be reversed, and a new trial ordered, with thirty dollars costs to appellant to abide the event.

BIJUR and DELEHANTY, JJ., concur.

Order reversed and new trial ordered, with thirty dollars costs to appellant to abide event.

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EDWARD CLAYTON et al., Plaintiffs, v. JOHN KINGSTON, Individually, etc., Defendant.

(Supreme Court, Bronx Special Term for Trials, June, 1921.)

Powers — when personal and not in trust — legacies — executors.

A power vested in executors to sell real estate devised to the husband of the testatrix, subject to the payment of legacies, at such times and in such manner as they may deem advantageous, is personal, confidential and discretionary and there being no trust to sell the property for the payment of legacies, which must be paid by the devisee, an action to have a lien impressed upon the realty to the extent of the legacies will not lie.

ACTION to impress a lien upon real estate for payment of legacies.

R. J. Reese, for plaintiffs.

D. Ashworth, for defendant.

MARTIN, J. The plaintiffs, who are legatees under the will of the wife of John Kingston, seek to have a lien impressed upon the realty to the extent of their respective legacies, and to have the real estate sold to satisfy them. The realty was devised to the defendant, John Kingston, absolutely, subject to the payment of these legacies. The power of sale provides that the executors, only one of whom, the husband, qualified, are authorized and empowered to sell the real estate at such times and in such manner as they deem most advantageous. Such power of sale is personal, confidential, and discretionary, and was not conferred for the purpose of conversion. There is consequently no trust to sell the property in order to pay the legacies. It was clearly the intent of the testatrix that they should be paid by her husband, who would then hold the realty absolutely free from

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charges; or, if not so paid, then to be paid out of the proceeds from the realty when sold. The charges of waste and mismanagement were not proved. Judgment for defendant, dismissing the complaint upon the merits.

Ordered accordingly.

RICHARD A. FARRELLY, Plaintiff, *v.* ALEXANDER WELLS, Defendant.

(Supreme Court, Bronx Special Term, June, 1921.)

Ejectment — violation National Prohibition Act — judgment for plaintiff on the pleadings.

Where upon the conviction of a tenant for a violation of the National Prohibition Act upon the leased premises, the landlord under the option given by the statute terminates the lease, demands possession and gives the tenant notice to quit, a motion by the landlord for judgment on the complaint and demurrer thereto in an action in ejectment will be granted.

ACTION in ejectment.

Edgar Hirschberg, for plaintiff.

Fitch & Grant, for defendant.

MARTIN, J. This action is brought in ejectment to enforce a forfeiture due to an alleged violation by the defendant, the lessee under a written lease, of the provisions of the National Prohibition Act. The complaint alleges the arrest of defendant for a violation of the provisions of that law and his conviction and fine upon a plea of guilty. The complaint also sets forth that plaintiff, under the option given by the statute, terminated the lease, demanded possession and gave notice to quit. The defendant demurred to the complaint. The plaintiff then moved for judgment upon the pleadings. For the purpose of this

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motion the facts set forth in the complaint must be considered as true. Section 23 of the National Prohibition Act provides that any violation thereof upon any leased premises by the lessee or occupant thereof shall at the option of the lessor work a forfeiture of the lease. That law was enacted to carry out the provisions of a constitutional amendment which is applicable to all the states and territories, and is, therefore, binding on all the inhabitants thereof. It was not necessary to plead the constitutional amendment or the National Prohibition Act. That act is a general statute. Article 6 of the Constitution provides: "This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." In *Case* v. *First Nat. Bank,* 59 Misc. Rep. 269, the court said: "As general laws constitutionally enacted by Congress are the supreme law of the land, the courts are bound to take notice of them without allegations of their provisions or proof of their enactment." In *Milliken* v. *Dotson,* 117 App. Div. 527, the court said: "We are all within the jurisdiction of the 'supreme law of the land,' and we are bound to recognize and apply it whenever it affects the substantial rights of parties before this court." The complaint states a cause of action. Upon the facts set forth plaintiff was justified in exercising the option given by the statute, and, having done so, he is entitled to possession of the premises now occupied by the defendant. Demurrer overruled. Defendant's motion denied. Plaintiff's motion is granted.

Ordered accordingly.

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JULIUS ZAP, Plaintiff, *v.* UNITED STATES CASUALTY COMPANY, Defendant.

(Supreme Court, Bronx Special Term, June, 1921.)

Insurance (accident) — when policy not subject to alteration — cancellation of policy.

A policy issued with intention to insure the property then described by the insured, is not subject to alteration by him or by the court, and if in an action to reform the policy so that it will cover an automobile which had recently been in a collision, his contention that the policy does not cover a machine owned by him at any time, is correct, he may not be heard to object to a cancellation of the policy and the return of the premium.

ACTION to reform a policy of accident insurance.

M. Cohen, for plaintiff.

C. S. Petrasch, for defendant.

MARTIN, J. The plaintiff seeks to reform a policy of accident insurance so that it will cover an automobile which has recently been in a collision. Plaintiff claims that through a mutual mistake a policy of insurance was issued to him to cover a Sandow truck, factory No. 5092, for a term of one year, beginning November, 1918, and ending November 15, 1919. He testified that through mistake he gave the factory number of his truck as 5092, although the machine was a 1917 model, and he should have given factory No. 1280. The accident above referred to occurred on May 19, 1919, during the period the policy was in force. The defendant, the United States Casualty Company, was requested to defend the action, but refused to do so, claiming that it had not insured the

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automobile in question. In May, 1918, plaintiff filed a verified claim against another insurance company for damages to a 1917 Sandow truck, factory No. 5092. In February, 1919, he had a policy of insurance in a company other than the defendant company altered to cover a truck No. 1280 instead of No. 3061. In October, 1919, plaintiff made an affidavit, in which he stated: "I have operated only two trucks in the past year, one of which I had right straight along and now have, and the other one, a 1917 Sandow, bearing factory No. 5902, I exchanged for the 1919 Sandow." The above statements are not consistent with plaintiff's testimony upon the trial, that he never owned a Sandow truck, 1917 model and factory No. 5092. Upon the testimony before me the plaintiff has not proved a mutual mistake. *Salomon* v. *North British & Mercantile Ins. Co.*, 215 N. Y. 214. The plaintiff was bound to prove that it was the intention of the defendant, as well as his own intention, to have the policy read and stipulate as he now seeks to have it. The defendant did precisely what it intended and was instructed to do. It did not make a mistake, and it understood and apprehended accurately and fully the instruction and direction given it, and acted in strict conformity with such instruction. It did not agree or intend to agree otherwise than as stated in the insurance policy. The fact that the defendant may have been as willing to insure the plaintiff with regard to one car as another is not equivalent to a mutual mistake on its part in designating the car it intended to insure. The defendant intended to insure what the plaintiff then described. The defendant's intention attached itself to that description and is not subject to alteration by the plaintiff or by the courts. In the answer filed by defendant a cancellation of the policy of insurance is demanded. The

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defendant is entitled to have the policy of insurance canceled because of a breach of warranty. The insured stated that automobile No. 5092, which it requested the insurance company to insure, had never been in an accident, when as a matter of fact it had been in two accidents, and the insured had filed a claim to cover the loss in each instance. If plaintiff's contention is correct, that the policy does not cover a machine owned by him at any time, he should not object to a cancellation of the policy and the return of the premium. Judgment for defendant.

Judgment accordingly.

PIETRO ROSSI, Plaintiff, *v.* ANGELO R. GENTILE, Defendant.

(Supreme Court, Bronx Special Term for Trials, June, 1921.)

Vendor and purchaser — when title by adverse possession good — non-resident aliens incapable of inheriting real estate previous to the statute of 1874.

Where upon the trial of an action for damages because of defendant's failure to perform his contract to convey, it clearly appears that his continued possession and occupancy of the premises in question since 1871 to date has been open, notorious and undisputed, it must be held that he not only has a good and valid title by adverse possession but also through a valid chain of title, and when, upon the day set for the closing of title, he tendered a deed which plaintiff refused to accept on the ground that the title was unmarketable, the defendant is entitled to judgment dismissing the complaint.

The statute permitting a non-resident alien to inherit not having been enacted until 1874, it could not and did not affect the vested rights of the heirs of a tenant in common of the property, who obtained title by his death in 1871.

ACTION to recover damages for failure to perform a contract to sell real property.

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M. H. Hofstadter, for plaintiff.

H. Steinbock, for defendant.

MARTIN, J. This action is brought by the plaintiff to recover damages because of defendant's failure to perform a contract to sell real property. On the 26th day of January, 1920, the plaintiff and defendant entered into a contract in writing whereby it was provided that the defendant would sell to the plaintiff certain property in Bronx county. The contract described the property as follows: "All that certain lot, piece or parcel of land, with the building and improvements thereon, situate, lying and being in the borough of Bronx, in the city of New York, being part of the land designated by the number 22 on a certain map entitled 'Map of Highbridgeville,' on file in Westchester County Register's office, being bounded and described from said map as follows: Beginning at a point on the southerly line or side of Union (now 167th St.) distant westerly fifty (50) feet from the southwesterly corner of Highbridge avenue (now known as Ogden Ave.) and said Union (now 167th St.) as the same are laid down on said map; thence running southerly, on a line parallel with said avenue, 100 feet; thence westerly, parallel with said street, 25 feet; thence northerly, parallel with said avenue and part of the way through a party wall or partition, 100 feet to the said Union (now 167th St.); and thence easterly, along said street, 25 feet to the point or place of beginning. Said premises known as 152 West 167th St." It was stipulated in the contract that the deed should be delivered to the plaintiff at No. 81 East One Hundred and Twenty-fifth street, in the borough of Manhattan, city of New York, on the 10th day of February, 1920, at one o'clock in the afternoon of that day. The plaintiff

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appeared on the day set for the closing of title, and the defendant duly tendered a deed of said premises, which plaintiff refused to accept, claiming that defendant's title was unmarketable. It appears that prior to 1852 a piece of property was owned by Lawrence Darcy and Peter Darcy. Peter Darcy died in the year 1871. At the time of his death he was a citizen of the United States. He then owned a one-half interest in the property in question. He left surviving as his only heirs at law his brother, Lawrence Darcy, a citizen of the United States, cotenant in ownership in said premises, and his brothers, Patrick Darcy and Thomas Darcy, and a sister, Catherine McCann. Patrick Darcy and Thomas Darcy never became citizens of the United States, and at the time of the death of their brother they were subjects of the Kingdom of Great Britain and Ireland. They both resided without the United States, were alien non-residents and could not inherit. *Wainwright* v. *Low,* 132 N. Y. 313. Catherine McCann, one of the heirs at law of Peter Darcy, conveyed all her right, title and interest in the premises to Lawrence Darcy, and he conveyed all his right, title and interest in the premises to Daniel Darcy and Catherine Riley. Thereafter in a partition suit, in which Catherine Riley was plaintiff and Daniel Darcy and John Riley defendants, the premises were conveyed to Katherine Schmidt, and the parties to the partition suit quitclaimed all her right, title and interest in the premises to said Katherine Schmidt. Thereafter the title to the premises was conveyed by mesne conveyances to the defendant in this action. At the time of the death of Peter Darcy a substantial dwelling house was standing upon the premises in which Lawrence Darcy lived; in this he continued to live until 1872, when he sold the house in which he was living and moved back into the prem-

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ises in question, where he lived until his death, in 1886, whereupon his children came into possession of the premises which are the subject of this litigation, and continued therein until the premises were sold in the year 1887 in the partition suit to Katherine Schmidt referred to above. Katherine Schmidt then entered into possession and continued in possession until her death in the year 1904. In 1887 Katherine Schmidt caused the building then standing on the premises in question to be taken down, and the building which is now on said premises was erected in place thereof. The premises continued in that condition up to the present time. It was conceded on the trial that there was a continued possession and occupation of the said premises, open and notorious and undisputed, since the year 1871 to date. The defendant has a good and valid title to the premises in question by reason of adverse possession (*Ruff* v. *Gerhardt,* 73 App. Div. 245; *Baker* v. *Oakwood,* 123 N. Y. 16), and also through a valid chain of title. Peter Darcy was a naturalized citizen at the time of his death in 1871. At that time his alien non-resident brothers were incapable of inheriting the property, and the entire title to his property immediately vested in his heirs who possessed inheritable blood by virtue of citizenship. *Leary* v. *Leary,* 50 How. Pr. 122; *Luhrs* v. *Eimer,* 80 N. Y. 171; *Wainwright* v. *Low,* 132 id. 313. The law permitting a non-resident alien to inherit was not passed until 1874, therefore it could not and did not affect the vested rights of Peter Darcy's heirs who obtained title in the year 1871 by reason of his death. The defendant is, therefore, entitled to judgment dismissing the complaint.

Ordered accordingly.

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JOSEPH LORIA, INC., Plaintiff, v. THE STANTON COMPANY, SOLON L. FRANK, JACOB SELIG, HAROLD A. FRANK and MAY FRANK, as Executors of and Trustees under the Last Will and Testament of SAMUEL FRANK, Deceased, and BLANCHE E. FRANK, Defendants.

(Supreme Court, New York Special Term, June, 1921.)

Specific performance — if title is good at time of trial specific performance in certain cases will be decreed even if title defective at time of closing — when the giving of dower would upset the scheme of the will and the widow has received income from a trust fund in lieu of dower she is estopped from claiming dower — wills.

Where at the trial of an action brought by the purchaser to compel specific performance of a land contract of which time is not of the essence, the title to the property is good, the plaintiff may be required to specifically perform on his part even though the title was defective at the date of the closing of title, provided nothing has taken place in the meantime to his prejudice which would make performance on his part inequitable.

A contract to convey certain real estate of a testator having been made by his executors, the intending purchaser, on the day of closing, rejected the title because of a certain judgment against the executors which had been assigned and an alleged dower right of the widow of a former owner of the premises, but the purchaser offered to execute and deliver the purchase money bond and mortgage called for by the contract and tendered a cash payment thereunder, on condition that the executors give a conveyance clear of the objections made to the title. *Held*, that the reception in evidence, on the trial of an action to compel specific performance brought by the purchaser, of an instrument in writing purporting to release the premises in question from the lien of said judgment, duly recorded and properly indexed, cured the objection to the judgment, and that the defendant executors, who also asked for specific performance,

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were entitled thereto, it not appearing that such course would tend to make it inequitable to the plaintiff.

It appearing that to give dower to the widow of the former owner of the property would necessarily upset the scheme of his will, by which he intended she should have no dower, and would keep from the testamentary trustees, who were vested with the title to the entire estate with full power of sale, a portion thereof, and the widow, having for a number of years elected in lieu of dower to receive the income of trust funds into which the proceeds of a sale of real estate by the said trustees had passed, she would be estopped to set up a claim of dower in the premises in question.

ACTION for specific performance.

Nathan Burkan, for plaintiff.

Griggs, Baldwin & Baldwin, for defendants.

COHALAN, J. The action is one for specific performance. The plaintiff and defendants in December, 1919, entered into written contract for the purchase and sale of certain real estate located in the borough of Manhattan. The purchase price was $50,000, payable as follows: One thousand dollars on signing of the contract, $4,000 in cash on delivery of the deed, $25,000 by taking the premises subject to a first mortgage for that amount, and $20,000 by the purchaser executing and delivering to seller its bond and mortgage for that amount. The sellers were to procure for and deliver to purchaser at closing of title a three-year extension of the first mortgage at the rate of five per cent per annum. Title was to close December 23, 1919. The title company searching title for the purchaser raised two objections, which are the ones now before this court. One was a judgment against the defendant executors for $16,588.06 and held by defendant Blanche E. Frank by assignment; the other objection was an alleged dower right

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in the widow of Joseph D. Carroll, a former owner of the premises. The date of closing of title was adjourned from time to time, closing to be as of December 31, 1919. On the last adjourned date, February 19, 1920, the plaintiff rejected title and brought the present action. The plaintiff paid the $1,000 on signing of contract and tendered at closing the $4,000, and offered to execute and deliver the purchase money bond and mortgage on condition that defendants give a conveyance clear of the two objections above mentioned. The defendants tendered a deed of conveyance, claiming there was no outstanding dower right, and offered to cancel the judgment. It would seem no satisfaction piece of the judgment or any instrument releasing the premises in question from the lien of the judgment was presented at closing. At the trial the defendants offered in evidence an instrument purporting to release the premises from the lien of the judgment, dated May 31, 1921, and recorded in the office of the register of the county of New York on May 31, 1921, in liber 3212, page 312, of conveyances, and indexed under block No. 880 on the land map of the city of New York. There seems to be nothing in the contract making time as of the essence, and, if no change of circumstances has occurred, this instrument would cure objection as to the judgment, and as the defendants are asking for specific performance they would be entitled to it. In an equitable action the rule seems to be well settled that a purchaser will be required to perform specifically if the title is good at the time of the trial, even though defective at the date of closing of title; that is, providing nothing has taken place in the meantime to the prejudice of the purchaser which would make performance on his part inequitable. *Pakas* v. *Clarke*, 136 App. Div. 492; *Schmidt* v. *Reed*, 132 N. Y. 108; *Haffey* v. *Lynch*, 143

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id. 241. Nothing was shown at the trial that would tend to make it inequitable to the purchaser. It has an existing lease on the premises, and it desires to continue its business there. The plaintiff, in an adjustment of figures, would be entitled to approximately $3,900, made up of rent paid in and interest on the $5,000, and the defendants would be entitled to approximately $3,300, based on the interest paid on first mortgage and the interest they would have received from the second mortgage and cash payments, and this amount plus the interest due July first on the first mortgage, which should be paid by the defendants, would give them a credit of approximately $3,900, the same credit as that to which the plaintiff would be entitled. In view of the above, were the question as to the judgment the only one involved, the defendants would be entitled to specific performance, with the condition, however, that they pay the interest due on the first mortgage on July first. But a more serious objection is found in the question of dower. Dower is never excluded by a provision in a will for a wife except by express words or by necessary implication. In the instant case there is nothing stated in any clause of the will or codicil that the wife should take the income of the two trust funds in lieu of dower, so we must necessarily confine ourselves to whether from the will as a whole one may imply that the provision for the wife was in lieu of dower. Do the provisions of the will show a clear intention on the part of the testator to exclude the widow from a dower in his real estate so that she was put to her election as to the acceptance of the provisions for her benefit made in the will or dower in the decedent's real estate? The real estate left by the testator was of small value as compared with the rest of the estate. Approximately $500,000 was

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bequeathed to the executors and trustees "to invest and reinvest the same and to pay over the income," etc. Clause 16 of the will devises and bequeaths all the rest, residue and remainder of the decedent's estate to his executors and trustees in trust to invest and reinvest and to add the income therefrom to the principal sum of the trust until the decedent's daughter arrives at the age of twenty-one, when the whole income is to be paid over to the daughter, and upon her death decedent devises and bequeaths the principal trust fund to the children of his daughter, and in case the daughter dies leaving no child and leaving no will appointing a person or persons to receive the trust fund, then the same is to go to two nephews. Under clause 17 of his will it is provided that in directing and administering the several trusts the executors and trustees are authorized and empowered to sell any or all of the personal or real property and to invest the several trust funds in first mortgages, etc. The executors were permitted to retain all or any part of the property as they found it and as in their judgment might seem advisable. By codicil the decedent provided among other things that the provision in the will for the daughter and wife should be a first and second charge respectively upon the estate, and if for any reason the estate should not realize sufficient to carry out all provisions of the will the decedent directed that preference be given to the provisions for his wife and child. The codicil also created an additional trust fund for the decedent's wife. Careful consideration of the provisions of this will leads me to believe that the provisions for the wife were in lieu of dower. Any other construction would be inconsistent with the directions given to his executors and trustees and incompatible with the theory of the will itself. The intention was to vest title in the

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executors and trustees to the entire estate, and for them to invest and reinvest and apply the income from such investments for the purposes specified in the will and codicil. To give dower to the widow from the decedent's real estate would necessarily upset the scheme of the will and would keep from the hands of the trustees a portion of the property. The clause giving the power of sale is a strong indication of the testator's intention, taken in connection with the other clauses of the will and codicil. It is true that a mere power of sale to be promptly exercised for the purpose of distribution does not put the widow to her election, but here we have the vesting of title in the trustees, with power to sell and reinvest, and directions as to the control, management and payment of the income. Considering these conditions, it necessarily follows that the testator intended to keep the entire estate for the benefit of the trust and intended that the widow should have no dower in the real estate. In the instant case the widow has accepted the income of these trust funds for a number of years without making any claim of the dower right in the real estate, and the matter is now presented to this court by third parties. The property passed out of the hands of the trustee some time ago, and apparently the proceeds were placed in the trust fund out of which the widow has been drawing her income, as shown in the Surrogates' Court accounting. Under such conditions I think were she to set up a claim of dower she would be estopped. It is my opinion that the widow has elected to receive the income of the trust fund in lieu of dower and would be estopped at this date to claim dower on the premises in question. Submit judgment and findings in accordance with above.

Ordered accordingly.

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THE DE MILLE COMPANY, a New York Corporation, BEATRICE M. DE MILLE and CECIL B. DE MILLE, Plaintiffs, v. PAT J. CASEY, PROTECTIVE AMUSEMENT COMPANY and BIOGRAPH COMPANY, Defendants.

(Supreme Court, New York County, June, 1921.)

Contracts — when executory contract may be terminated by injured party — equitable relief — motion pictures — royalties — accounting.

Where there has been a breach of an executory contract whether it be in payment of the consideration or otherwise so substantial and fundamental as to strongly tend to the defeat of the essential object of the parties in making the contract, it may be terminated by the injured party. (P. 653.)

Though the injured party has the right to terminate the contract it does not necessarily follow that a court of equity will decree a cancellation thereof, but where the contract confers upon the other party the privilege to use and enjoy a property right of the injured party, the continued use of which works to its injury, notwithstanding a material breach of the contract, equity may grant relief. (Pp. 654, 655.)

Plaintiff, the owner of the copyright of a number of stage plays, granted to defendant C., and his assigns, a license to dramatize, produce and exhibit them in the form of motion pictures by a contract reserving a weekly royalty for the use of each of the several plays wheresoever and by whomsoever exhibited, such contract to continue for a term of eight years from its date and thereafter, as long as the royalties should be paid. Although the films were first available for rental to exhibitors in May, 1914, no royalties were paid after the fifth of the following October, at which time only thirteen-sixteenths of the term of the contract had expired. There was no express repudiation of liability to pay royalties either on the part of C or his assignee upon which he depended to be put in funds and which had so placed itself in the hands of another as to incapacitate itself to collect a part of the earnings to which it was entitled. Plaintiff gave written notice to all parties that it elected to terminate the contract because of default of the payment of royalties and that further exhibition of the films was prohibited, but wholly ignoring such notice the exhibition of

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the plays was continued. In an action to have the contract terminated and for an injunction and accounting, *held;*

That it was the effect of the breach upon the mutuality of the contract for which the law has regard and that whether plaintiff's failure to receive royalties was due to C's repudiation of the contract, to wilfulness or to impecuniosity was immaterial, and that plaintiff would be granted a decree that will make effective the termination of the contract, which, theoretically, was accomplished by the notice given by plaintiff. (Pp. 653–655.)

One of the functions of equity being to avoid unnecessary litigation and to administer such relief as the nature of the case and the facts, at the end of the litigation, demand, the decree to be entered should carry an accounting by C down to the date of its entry, but on no principle may the other defendant, whose only interest in the plays was subject to the contract with C, be held to account either before or after the notice of termination. (Pp. 657–659.)

ACTION to terminate contract and for an injunction and accounting.

Ernst, Fox & Cane (Nathan Burkan and Melville H. Cane, of counsel), for plaintiffs.

Prince & Nathan (Sidney J. Loeb and Leon M. Prince, of counsel), for defendant Pat J. Casey.

Aronson & Salant (Louis Salant, Mortimer Fishel and I. M. Dittenhoefer, of counsel), for defendant Protective Amusement Company.

Charles F. Kingsley (Charles F. Kingsley and Anthony J. Ernest, of counsel), for defendant Biograph Company.

HOTCHKISS, J. The record in this case is voluminous, but what I conceive to be the material facts are comparatively simple. The De Mille Company was the owner of copyrights of thirteen stage plays. On March 19, 1913, plaintiffs entered into a contract

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with the defendant Casey by which Casey and his assignee were given the sole and exclusive right to produce and to license others to produce said plays in motion pictures, in consideration of which Casey agreed to pay the De Mille Company weekly a royalty of $75 per week for each and every week that each of said plays should be exhibited. In the event Casey sold the right to produce any of the pictures in any foreign country the De Mille Company was to receive five per cent of all sums realized therefrom by Casey or his assigns, the same to be paid weekly or within one week after the receipt of said earnings by Casey. Casey's rights under the contract were to continue for eight years from the date thereof "and thereafter as long as the royalties are paid at the rate and as herein provided." On receipt of the manuscripts of the plays Casey was to pay $1,000, and sixty days thereafter the further sum of $1,250 as advance royalties. Casey received the manuscripts and paid the $2,250. The Protective Amusement Company (hereinafter called the Amusement Company), in which Casey and Klaw & Erlanger were the ones principally interested, was promptly organized, and Casey transferred to this company his rights under the De Mille contract. On May 28, 1913, the Amusement Company entered into a contract with the Biograph Company, the material terms of which were as follows: The Amusement Company agreed to provide copyrights, plays and subjects for motion pictures, and also to supply the actors, scenery, costumes and other accessories and direct the work of the actors in the making of pictures; the Biograph Company agreed to take the pictures and make the films; the Amusement Company was to make contracts with exhibitors for the exhibition of the pictures, the films for which were to be delivered to exhibitors by the Biograph Company;

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the Amusement Company was to collect the rentals from the exhibitors and was to pay the Biograph Company a fixed sum per foot of film and reimburse it for certain expenses, and in addition was to pay that company forty per cent of the remaining sum; the Biograph Company agreed to render weekly statements of the sums due it, and the contract was to continue for ten years from July 15, 1913. In all some thirty-four plays, including plaintiff's thirteen, came under the operations of this contract, and of the plaintiff's plays films were made of twelve (all except "The Royal Mounted") between August 30, 1913, and March 30, 1914. These twelve films were first "released," *i. e.*, delivered to exhibitors, between May, 1914, and May, 1916. Certain of the more popular of the twelve were, after an initial period of exhibition, "released" a second time for a further run. The first distribution of films to exhibitors was made by the Amusement Company through the medium of one Waters as agent. Films of nine plays were thus marketed by Waters, who between March and June, 1914, paid the Biograph Company $19,500 as its proportion of the rentals collected. Casey rendered statements and made payments to the De Mille Company up to October 5, 1914. These statements covered but four of the films, although during the same period at least two other films were exhibited. No statements were ever made by Casey after said date, and the statements that were made were not based upon any accurate data because Waters never made written reports. The figures thus reported by Casey were by him made up from information gleaned in part from rumor and sources of theatrical publicity and in part from conversations with Waters, but of this the De Mille Company was not told. In the spring of 1914 Klaw was president or treasurer or

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both, Casey vice-president, and Erlanger managing director of the Amusement Company. Klaw & Erlanger were also largely interested in the General Film Company, a corporation which controlled many local exchanges or agencies for the renting of films. At some time during this period, and as the result of conferences between Kennedy, president of the Biograph Company, Klaw, Erlanger and Casey, the Amusement Company was practically eliminated from all active part in the production and distribution of the films of plaintiff's plays. There was no written agreement, and exactly what agreement was made is not clear. A resolution of the board of directors of the General Film Company entered in its minutes is the only writing referring to the transaction, and from this it appears that the General Film Company was substituted for the Amusement Company as the distributor of the films, and that from the rentals it received from exhibitors the film company was to pay certain fixed sums to the Biograph Company and seventy per cent of the remaining gross receipts. Exactly what compensation this new arrangement left for the Amusement Company does not appear. At or about this time arrangements were made to market the films abroad, and one Nichols was chosen as the medium for this work, which resulted in the receipt of substantial sums. The General Film Company received weekly reports from its exchanges of the placing of pictures and the rentals therefrom, and every two weeks that company reported to the Biograph Company and made the payments to which the latter company was entitled. This custom continued until about June, 1919, when the General Film Company became bankrupt. For a short time the Biograph Company from time to time made certain reports of its receipts to the Amusement Company,

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but there was no regularity in the rendition of these reports, which finally ceased. The Biograph Company paid no money to the Amusement Company and claimed to withhold payments because of debts asserted to be owing to it by that company. The sums earned by said films, and to which the De Mille Company was entitled as royalties under its contract with Casey, aggregated a sum greatly in excess of the total amount paid by Casey to the De Mille Company. Repeated demands were made by plaintiffs upon Casey to comply with his contract, but his uniform excuse for failing so to do was that he could get no statements showing what use had been made of the films. On February 25, 1916, plaintiffs gave to all the defendants written notice that it elected to terminate the contract with Casey because of his failure to pay royalties, and that further exhibition of the films was prohibited. This notice was wholly ignored and the exhibition of the plays was continued. It is contended by the Amusement Company that at all times it in good faith and to the best of its ability sought to secure from both the Biograph Company and the General Film Company statements of the use made of the films and of the moneys earned, and that its failure so to do was in no way attributable to any neglect on its part. A similar claim is advanced on the part of Casey. There is much in the record to cast suspicion upon the bona fides of each of these defendants, but inasmuch as in my opinion this feature of the case is immaterial, no finding need be made thereon. In the present action plaintiffs seek to have the contract with Casey terminated, that the several defendants be enjoined from further use of the films and that they account. The primary question is, may the contract be annulled? A brief analysis of its nature and terms will be helpful. It was a license

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to Casey and his assigns to enjoy some of the rights (whatever they may have been) inherent in plaintiff as owner of the copyrights in the plays, *i. e.*, the rights to dramatize, produce and exhibit them in the form of motion pictures. For the use of each of the several plays a weekly royalty was reserved for each week it was exhibited, "wheresoever and by whomsoever," and this royalty was to be paid weekly. An advance on account of prospective royalties was paid, but inasmuch as the royalties earned exceeded this sum this advance payment is not material as an equitable feature in defendants' favor in determining plaintiffs' right to cancel. *Hurst* v. *Trow P. & B. Co.*, 2 Misc. Rep. 361; affd., on opinion below, 142 N. Y. 637. The term of the contract was eight years from its date, "and thereafter," as long as the prescribed royalties should be paid. It ran to Casey and his assignee. It was assigned. The films were first available for rental to exhibitors in May, 1914. No royalties were paid after October 5, 1914. At this time only about thirteen-sixteenths of the eight-year term had expired. This failure to pay may or may not have been due to willfulness, but there was never on the part of Casey or his assignee any express repudiation of liability to pay. Stated in terms most favorable to the defendants, Casey had availed himself of his right to assign, and his assignee, upon which he depended to be put in funds, had so placed itself in the hands of another as to incapacitate itself to collect the part of the earnings to which it was entitled. It thus appears that save for a comparatively insignificant period the consideration for the contract failed, and under circumstances which gave no reasonable ground for supposing that this failure was not permanent. It is not unusual to characterize the annulling of an executory contract for breaches

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affecting the consideration as a "rescission" and to attempt to adjudge the rights of the parties by the rules applicable where "rescission" *ab initio* is sought in a court of equity. Counsel for certain of these defendants have been betrayed into this mistake. But as was said in *Elterman* v. *Hyman*, 192 N. Y. 113, 126: "The termination of a contract as to the future by one party owing to the default of the other is a rescission neither *ab initio*, nor in any other true sense." See, also, *Anvil Mining Co.* v. *Humble*, 153 U. S. 540, 551; *Hurst* v. *Trow P. & B. Co.*, *supra*. Without regard for what may be the rule in other jurisdictions, I think there is ample authority in this state for the proposition that where there has been a breach of an executory contract such as the present, whether it be in the payment of the consideration or otherwise, "so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract," it may be terminated by the injured party. *Callanan* v. *Keeseville, A. C. & L. C. R. R. Co.*, 199 N. Y. 268; *Raftery* v. *World Film Corp.*, 180 App. Div. 475; *Hurst* v. *Trow P. & B. Co.*, *supra*; *Saltus* v. *Belford Co.*, 133 N. Y. 499; *Hyatt* v. *Ingalls*, 124 id. 93; *Bobbs-Merrill Co.* v. *Universal Film Co.*, 160 N. Y. Supp. 37. As a practical matter it made no difference to the De Mille Company whether its failure to receive royalties was due to a repudiation of the contract on Casey's part, to willfulness or to impecuniosity. Whether the default was willful or from neglect merely is in my opinion immaterial. See *Callanan* v. *Keeseville, A. C. & L. C. R. R. Co.*, *supra*, 287. It is the result of the breach, not the motive, the effect of the breach upon the mutuality of the contract, for which the law has regard. As Prof. Williston says in his essay on "Repudiation of Contracts" (14 Harv. Law Rev. 317): "The

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essential element which exists in all these cases is something still to be performed in the future under the contract which, as he has made manifest, he is not going to perform. Whether the reason he discloses for his prospective failure to perform is because he cannot or because he will not seems wholly immaterial, though the word 'repudiation' is more strictly appropriate to cases where an intention not to perform is manifested irrespective of ability." See, also, 2 Williston Cont. 1656. An analogy to the right to abrogate in such cases as the present is found in the former common-law rule in this state (*Kokomo Strawboard Co.* v. *Inman*, 134 N. Y. 92; *Nichols* v. *Scranton Steel Co.*, 137 id. 471) governing the seller's right to terminate for non-payment in the case of sales of goods deliverable and to be paid for in installments. The present test in such cases, as prescribed by the Sales Act, has been expressed in language that may well be adopted in actions such as this, namely, that the right to terminate "depends upon the question whether the default is so substantial and important as in truth and fairness to defeat the essential purpose of the parties." *Helgar Corp.* v. *Warner's Features*, 222 N. Y. 449, 453. Of course, because a plaintiff may have the right to terminate the particular contract, it does not necessarily follow that he may come into a court of equity for a decree of cancellation. His rights may be such as are solely cognizable in a court of law, where a judgment for damages will afford complete compensation and relief for any injury he has suffered. Such is the case arising from the breach of an ordinary contract for the sale and delivery of goods in installments. But in a case like the present, where the contract confers upon the defendant the privilege to use and enjoy a property right belonging to the plaintiff, which privilege the

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defendant continues to enjoy and to make use of to plaintiff's injury, notwithstanding his (defendant's) material breach of the contract, plaintiff invokes but an elementary principle of equity jurisdiction when he seeks a decree to establish his rights. In such a case plaintiff may or may not, before he commences his action, have given defendant notice of his election to terminate. But if such notice has been given and, as here, defendant has ignored the notice, reason and justice require that plaintiff be given a decree that will make effective the termination which was theoretically accomplished by the notice. There is a still further ground on which the jurisdiction of a court of equity may here be invoked. By the very nature of its agreement with Casey the De Mille Company could have no knowledge, save as gained from rumor and gossip, of the extent of the use made of the films. Casey, too, had put it beyond his power to obtain more extended information, save as it might be accorded to him by the Biograph Company, which latter company had in effect repudiated all obligation to enlighten the Amusement Company concerning the exhibition of the films or the earnings therefrom. Such was the condition at the time plaintiffs served their notice of revocation, and so it continued, the Biograph paying no heed to the notice. The territory in which the films might be exhibited was unlimited, and the earning value of plaintiffs' plays in the form of motion pictures necessarily diminished as the plays became more familiar to the public through the exhibition of these films. But to estimate the resulting damage would be difficult, if not impossible, and from this circumstance equity will assume jurisdiction. *Callanan* v. *Keeseville, A. C. & L. C. R. R. Co., supra,* 287; *Raftery* v. *World Film Corporation, supra,* 482. The principle of law on which the right to terminate in any case

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exists is founded upon the doctrine of failure of consideration and is one of the phases of the law of anticipatory breach. Precisely to what class of contracts this doctrine is applicable I do not consider it necessary to determine. *Kelly* v. *Security Mutual Life Insurance Co.*, 186 N. Y. 16; *McCready* v. *Lindenborn*, 172 id. 400; *Nichols* v. *Scranton Steel Co., supra; Werner* v. *Werner*, 169 App. Div. 9; *Bauchle* v. *Bauchle*, 185 id. 590; *Moore* v. *Security Trust & Life Insurance Co.*, 168 Fed. Repr. 496; *Washington County* v. *Williams*, 111 id. 801; *Roehm* v. *Horst*, 178 U. S. 1. The right to terminate has so often been the subject of a favorable decree in actions analogous to the present (*vide* cases first hereinbefore cited) that I refrain from analyzing the cases last above cited and from attempting further to sustain the jurisdiction of the court to entertain this action. Plaintiffs' right to terminate the contract and to come into equity for a decree making that termination effective having been established, it remains to inquire what further relief in the way of accounting may be had against the various defendants. Plaintiffs never copyrighted any screen versions of their stage plays. Screen copyrights for a number of the plays in question were put in evidence. They were taken out in the name of Klaw & Erlanger, who were executive officers of and evidently in control of the Amusement Company. By what right or under what circumstances these persons secured these copyrights does not appear. The remainder of the screen plays were not shown to have been copyrighted by anybody. No evidence was offered to connect plaintiffs with any of the screen copyrights. They are not even mentioned in the complaint or in any of the answers, and Klaw & Erlanger are not parties hereto. The question of screen copyright or the liability of any of the defendants to

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account because thereof, either before or after the notice of revocation of February 25, 1916, does not, in my opinion, enter into the case. If the plaintiffs' right to an accounting against any of the defendants depended upon the Federal Copyright Law, concededly this court would be without jurisdiction to enforce it. Whatever rights plaintiffs have must, if sought to be enforced in this action, be such as arise under the contract or as the common law gives. The license to exhibit ran to Casey and his assignee, but the promise to pay was by Casey "wheresoever and by whomsoever" the films might be exhibited. Casey's personal liability to account, at least up to notice of termination, is thus so clear from the terms of the contract itself as to render unnecessary any consideration of the law governing the liability of a party to a contract who has assigned his rights thereunder. See *Wilson* v. *Mechanical Orguinette Co.*, 170 N. Y. 542. For the period subsequent to the notice of revocation the right to compel Casey to account is not clear. It may be conceded that the notice terminated the contract without the aid of a court of equity. *Schalkenbach* v. *National V. Co.*, 129 App. Div. 389; *Russell H. & I. M. Co.* v. *Utica D. F. & T. Co.*, 195 N. Y. 54, where there had been no notice. But to make the notice of revocation effectual and to put a stop to the wrongs growing out of defendants' refusal to respect the notice an appeal to a court of equity was necessary. One of the functions of equity is to avoid unnecessary litigation, and it is a truism to say that when courts of equity have once assumed jurisdiction it is their practice to administer such relief as the nature of the case and the facts demand and to bring that relief down to the close of the litigation. *Kilbourne* v. *Board of Supervisors*, 137 N. Y. 170, 178. Casey is in no position to resist the exercise of such jurisdiction.

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The estoppel which closes his mouth to dispute plaintiffs' title while the contract was in operation, and before it was terminated, has continued during the time he has resisted plaintiffs' present attempt to enforce recognition of their rights by judicial decree. Why, then, should this decree not carry Casey's accounting down to the date of its entry? Why remit plaintiff to some other action for such of his license fees as have arisen subsequent to his notice of termination? I can see no reason for so doing, and unless restrained by controlling authority the plainest principles of equity require that such a course should be avoided. But it may be said that in *Hyatt* v. *Ingalls* and *Saltus* v. *Belford Company, supra,* and similar cases the accounting was expressly limited to the date when the contract was terminated or rescinded. True, but I think the cases are distinguishable. In those cases and in all similar cases of contracts involving copyrights or patents, a state court cannot ignore the fact that its jurisdiction is strictly limited to such rights as arise from the contract. From and after the termination of the contract in such cases the compensation for the use of the copyright or patent is strictly a matter for the federal courts. This difference in the nature or quality of the compensation for use in such cases before and after termination or recission does not cease because it is made the subject of a decree. And although the wrongdoer may himself be said to be estopped from denying the contract so long as he takes its benefits, his estoppel cannot be made a medium for conferring upon state courts jurisdiction of a subject matter they do not possess. But, as I have shown, we have here no question of copyright. For these reasons Casey's accounting should run until decree shall be entered. *DeBekker* v. *Stokes Co.,* 168 App. Div. 452; opinion on reargument,

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172 id. 960; affd., 219 N. Y. 573. As for the other defendants, I see no principle on which they may be held to account either before or after the notice of termination. Although they acquired whatever interests in the plays they may have had subject to the contract between plaintiff and Casey (*Farmers' Loan & Trust Co.* v. *Galesburg*, 133 U. S. 156), they have not assumed and cannot be held to perform any of the covenants of that agreement. *Case* v. *Case*, 203 N. Y. 263; *Anderson* v. *New York & H. R. R. R. Co.*, 132 App. Div. 183. There was no novation, nor can they be held upon any theory of implied promise to pay plaintiff growing out of their use of the films. For the period prior to the notice of revocation they were not wrongdoers, because they were acting as licensees by virtue of Casey's right to assign. It follows that for the period before notice of termination defendants other than Casey cannot be held to any liability. For the period subsequent to February 25, 1916, it would also seem that no relief can be had against these defendants, inasmuch as plaintiffs' right to compel an accounting must depend solely upon their common-law rights, if any. But by copyrighting the stage version of their plays they lost their common-law rights therein (*O'Neill* v. *General Film Co.*, 171 App. Div. 854) and incidentally their common-law rights to the screen production thereof, although under the federal statute the rights of dramatization for the stage and for the screen are separable. *Photo-Drama M. P. Co.* v. *Social U. F. Corporation*, 220 Fed. Repr. 448. Such statutory rights as may have remained, as we have seen, are not involved and could not be enforced in this action if they were. Let findings and a decree be presented in accordance with the foregoing.

Judgment accordingly.

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Matter of the Application to Punish JOHN ANDERSON LEACH, for a Contempt in Refusing to be Sworn as a Witness, in the Matter of the New York State Legislative Committee to Investigate the Affairs of the City of New York.

(Supreme Court, New York Special Term, June, 1921.)

Witnesses — legislative committees — right to delegate its power must be found in resolution — sub-committee of one to investigate unauthorized — when witness not subject to punishment for contempt.

The power of a committee of the legislature to delegate its power, if any such right exists, must be found in the express provision of the resolution pursuant to which the committee was appointed and may not be read into the resolution by judicial construction and interpretation.

Where by a resolution of a committee to investigate, its chairman was appointed a committee of one to appoint sub-committees and not to investigate, a motion to punish, as for contempt, a witness duly subpoenaed before said chairman for refusing to be sworn before him, must be denied.

The resolution of the legislature appointing the committee of investigation could not and did not repeal section 61 of the Legislative Law which declares: "Whenever any standing committee of either house of the legislature shall be required to make an inquiry or investigation such committee may appoint a sub-committee of not less than three of its own members to make such investigation, etc.," and the power to appoint sub-committees may not be delegated to an individual member of the whole committee.

MOTION to punish for contempt.

John P. O'Brien, corporation counsel, for the city of New York.

Elon R. Brown, Samuel A. Berger and Leonard M. Wallstein, for joint legislative committee.

WHITAKER, J. Motion to punish a subpoenaed witness for contempt for refusal to be sworn before an individual member of the legislative committee. The resolution of the legislature, in so far as it is material

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to the question, provides as follows: "The committee may at any time and from time to time by resolution of a majority of its members be subdivided into subcommittees of such number as it may by majority determine, which subcommittees may sit at the same time and place or at different times and places in the State of New York during the session of the Legislature, during its recess or after adjournment, each subcommittee to appoint its own chairman and to act by majority vote of its own members, and to administer oaths and to issue subpoenas requiring the attendance of witnesses and the production of books, papers and documents, and to do all other acts and things that may be done by the committee as a whole or that may be delegated to it by the full committee." Pursuant to that power the whole committee passed the following resolution: "*Resolved* that the committee hereby designates the chairman as a subcommittee of this committee, and authorizes the chairman to appoint so many additional such subcommittees as he may determine, consisting of one or of three members each, as may be determined by the chairman. The chairman as such subcommittee and such other subcommittees as the chairman may appoint shall have and shall exercise all of the powers provided with reference to such subcommittees by the joint resolution constituting this committee, provided, however, that the subject matter to which the jurisdiction of any such subcommittee shall attach may be limited as specified in writing by the chairman." The chairman was not appointed by this resolution a committee of one to investigate, but a committee of one to appoint subcommittees. Had the resolution intended to appoint him a committee to investigate with no directions or limitations, the resolution would have amounted to a delegation of the entire power of the committee to one individual member. Acting under this resolution to appoint subcommittees, the chairman appointed

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himself a subcommittee of one and proceeded to conduct the investigation. This power to appoint subcommittees could not, under the terms of the original resolution, be delegated to one of its individual members. Moreover, section 61 of the Legislative Law provides as follows: "Subcommittees. Whenever any standing committee of either house of the legislature shall be required to make an inquiry or investigation, such committee may appoint a subcommittee of not less than three of its own members to make such inquiry or investigation, and to take testimony in relation thereto; and such committee or subcommittee and the chairman thereof shall respectively have all the powers and authority, which are conferred by law upon any committee which is authorized to send for persons or papers, or upon the chairman thereof." The joint resolution could not and did not repeal this statute. It would be contrary to usual custom, and in the court's opinion to sound public policy, in cases like the present for the committee to delegate its powers to one individual member in matters that require the exercise of judgment and discretion; at least, the right to so delegate its powers, if such right exists, should be found in the express provisions of the resolution. Such a power should not be read into the resolution by judicial construction and interpretation. It would serve no purpose upon the determination of this motion to discuss the various cases and precedents cited by the parties and to enter into an extended argument to sustain the conclusion to which the court has arrived, nor is it any part of the court's duty to make observations upon the motives of the respective parties. In so far as sitting in open or secret session, I think that is a matter entirely within the best judgment and discretion of the whole or a subcommittee.

Motion denied.

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MEMORANDA

Opinions not Otherwise Reported.

UNITED STATES TRUST COMPANY OF NEW YORK, Plaintiff, *v.* DOROTHY HOYT, Otherwise Known as DOROTHEA HOYT; VAVIS PETERSON HOYT, Individually and as Executrix of the Will of REUBEN M. HOYT, Deceased; NESBITT HOYT BANGS, L. BOLTON BANGS, ISABEL HOYT BANGS, CORNELIA B. HOYT, Individually and as Guardian of the Property of JESSE HOYT; CORNELIA WARING HOYT, ISABEL HOYT, JESSE HOYT and COMPTROLLER OF THE STATE OF NEW YORK, Defendants.*

(Supreme Court, New York Special Term, May, 1915.)

Adoption — A deed of trust provided that in case there should be no issue of the beneficiary living at the time of the disposition of the principal of the trust the principal should be paid over to the next of kin of the beneficiary. Held, that the adopted daughter of a deceased brother of the beneficiary was one of the next of kin of the beneficiary under the deed of trust and entitled to her share in the distribution of the fund — The words "next of kin" do not include a widow — Domestic Relations Law, § 114.

ACTION relating to the disposal of a trust fund.

Stewart & Shearer, for plaintiff.

Lord, Day & Lord, for Isabel Hoyt Bangs, defendant.

Reeves & Scrugham, for Cornelia B. Hoyt et al., defendants.

Anson Baldwin, for Jesse Hoyt, defendant.

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*Published by request. Affirmed, without opinion, 173 App. Div. 930; 223 N. Y. 616.—[REPR.

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Samuel T. Carter, Jr., for Dorothy Hoyt, defendant.

Henry De Forest Baldwin, guardian ad litem for Nesbitt H. Bangs, defendant.

H. A. Cushing, for Vavis P. Hoyt, defendant.

ERLANGER, J. The controversy relates to the disposal of a trust fund now in the hands of the plaintiff for distribution, pursuant to a deed of trust made by Rhoda E. Hoyt, the operative provisions of the instrument being as follows: "To have and to hold said property to the party of the second part, its successors and assigns, in trust, however, for the following uses and purposes, namely, to hold, manage, invest and reinvest the same; to collect and receive the interest, income and profits thereof, and after deducting all proper charges and expenses, to apply the said interest, income and profits to the personal support, maintenance and comfort of my son, Reuben M. Hoyt, for and during his natural life, free from any liabilities or debts created by him, and upon the death of my said son, Reuben M. Hoyt, to divide the principal of said trust fund or the securities in which it may then be invested into as many equal shares as there shall be children of my said son, Reuben M. Hoyt, then living, and to pay over to each of said children of my son, Reuben M. Hoyt, one equal share or portion of said principal. In the event that any of the children of my son, Reuben M. Hoyt, shall have died before the time of the distribution of the principal as above provided for, leaving a child or children him or her surviving, such child or children shall take the share or portion of its or their deceased parent and in equal shares if more than one. In case there shall be no issue of my son, Reuben M. Hoyt, living at the time of the disposition of the principal as above provided for, then the said principal shall be paid over to and among the persons who are then next of kin of my son, Reuben M. Hoyt, in the man-

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ner and proportions directed by the laws of the State of New York for the distribution of the estates of persons dying intestate; but, in no event, shall any portion of said principal become the property of Charlotte M. Hoyt, wife of my son, Reuben M. Hoyt." The life beneficiary, Reuben M. Hoyt, died on May 16, 1914, leaving no issue and no father or mother. His surviving relatives were his widow, the defendant Vavis P. Hoyt; a sister, defendant Isabel Hoyt Bangs; a nephew and two nieces, the defendants Jesse and Isabel Hoyt and Cornelia Hoyt Leslie, children of a deceased brother Jesse Hoyt, and the defendant Dorothy Hoyt, alleged to be the duly adopted daughter of another deceased brother, Frank R. Hoyt. As the case is presented, I am to determine whether the defendants Dorothy Hoyt and Vavis P. Hoyt are within the class of remaindermen described by this trust deed as "the next of kin" of Reuben M. Hoyt, and entitled thereunder to receive a share of the fund "in the manner and proportions directed by the laws of the State of New York for the distribution of the estates of persons dying intestate." It is contended by the blood relatives that Dorothy Hoyt was not legally adopted, and that, in any event, assuming her adoption to have been in accordance with law, she was not within the class of "next of kin" of Reuben M. Hoyt, a brother of the adopting parent. Upon the facts, if the question of this adoption were presented for original examination, there might be some doubt whether the statutory provisions governing the subject had been satisfied. The statute then applicable (Laws of 1884, chap. 438, § 7) provides: "Any child which a corporation specified in the first section of this act is, by the fifth section of this act, authorized to bind out may be placed by such corporation, by adoption, with some suitable person or persons, by a written instrument of adoption, * * *." The class of corporations so designated in the 1st section is "any

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incorporated orphan asylum or other institution incorporated for the care of orphan, friendless or destitute children." Turning to the charter of the institution out of which the defendant Dorothy Hoyt was given in adoption, its purposes are defined to be "the maintenance and care of the children of wet nurses, and the daily charge of infants whose parents labor away from home." Apparently, therefore, this institution was not within the statute, and no authority existed for its standing in the place of the child's natural parents for the purposes of a contract of adoption, unless it may be said that the later appropriation of public funds by legislative enactment for the maintenance of children by the institution imported a recognition of broader corporate powers than its charter had expressed. To give such effect to these appropriation acts might be permissible, although the subject is by no means free from doubt, but, as I find, the question of the legality of the adoption has been settled by a former adjudication between these parties. An identical trust for the benefit of Frank R. Hoyt, the adopting parent of this defendant, became executed by his death, and the devolution of the remainder upon his "next of kin" raised the question of Dorothy Hoyt's *status* under the instrument of adoption. An action was brought by the present plaintiff in this court to determine the controversy, to which action Dorothy Hoyt and the blood relatives above named were parties. The court found that the adoption was legal and valid and that the adopted child was the "next of kin" of Frank R. Hoyt. The judgment which expressed this determination was affirmed upon an appeal taken by the adverse parties, the blood relatives now concerned. *U. S. Trust Co.* v. *Hoyt,* 150 App. Div. 621. While the point chosen for dispute in that action was whether an adopted child was "next of kin" within the meaning of the trust deed, an essential allegation

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to be established was that there had been an adoption, valid in law; otherwise the court would have had nothing to decide and the dispute between the parties was meaningless. This question of the adoption, as giving the defendant Dorothy Hoyt a *status,* was, of course, directly involved. It was fundamental to the case, and the judgment rendered had to proceed upon the direct finding that she was lawfully adopted. The necessary finding was made upon the evidence furnished by the articles of adoption and upon the stipulation made at the trial on behalf of all the parties that the adoption was valid. That this stipulation was joined in by guardians *ad litem* for infant parties does not affect its force. It was not a substitute for controlling evidentiary facts, since the necessary documentary evidence was before the court, and the concession of validity related only to the legal effect of general statutes or of public records as to which the court could be advised when accepting the stipulation in behalf of infants whose interests were affected. Actually, the parties came to trial conceding a basic question of legal construction to obtain the court's ruling upon this defendant's status. The court accepted the concession, presumably after such consideration as was deemed necessary, and rendered a judgment which is conclusive upon the question so decided, although upon stipulation (*Crouse* v. *McVickar*, 207 N. Y. 213), when the same basic question arises as between the same parties. *Clemens* v. *Clemens,* 37 N. Y. 59, 73; *Thorn* v. *De Breteuil,* 179 id. 64, 85. I cannot properly entertain the motion made at the trial upon behalf of the defendant Isabel Hoyt Bangs for the withholding of a decision upon the issues pending her initiation of some action or proceeding to limit the effect of the judgment now in evidence. Her only ground of complaint would appear to be that the stipulation made by her counsel upon the trial of the earlier action was not limited to the extent which she personally had intended and

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directed, but there is no indication that she or her counsel had been misled to the course taken, through any act attributable to the defendant Dorothy Hoyt, and the prospect of her obtaining relief from the judgment is too doubtful to be accepted upon the present appeal to the court's discretion. Indeed, short of a case of actual oppression, an application to stop the trial, in furtherance of one party's attempt to destroy his adversary's proof by independent litigation, should not be countenanced. Litigants are entitled to have their cases determined upon the evidence as it exists when they appear before the court to submit their differences, and if indefinite adjournments of a trial could be had in aid of a new action to change the effect of displeasing documents when offered in evidence, parties might well hesitate to enter upon the hazard of litigation for any purpose. I accept the judgment roll in evidence as conclusive upon the validity of the adoption of the defendant Dorothy Hoyt, and the question arises whether she may benefit, under the deed of trust in suit, as "next of kin" of Reuben M. Hoyt, a brother of her foster parent. That she is within the description of "next of kin" of Frank R. Hoyt, under an identical form of trust deed, is settled (*U. S. Trust Co.* v. *Hoyt, supra*), and, unless the statute is to be construed as limiting her right of inheritance to an interest derived directly from the foster parent, she is similarly one of the "next of kin" for the purposes of the present distribution. Decedent Estate Law, § 98, subd. 3. The statute (Dom. Rel. Law, § 114) provides: "Effect of adoption.—Thereafter the parents of the person adopted are relieved from all parental duties toward, and of all responsibility for, and have no rights over such child, or to his property by descent or succession. * * *" The child takes the name of the foster parent. "His rights of inheritance and succession from his natural parents remain unaffected by such adoption. The foster parent or parents and

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the person adopted sustain towards each other the legal relation of parent and child, and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, * * * and such right of inheritance extends to the heirs and next of kin of the person adopted, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting * * *." Because the words of this statute do not extend to a right of inheritance "through" the foster parent, it has been held that the adopted child may not inherit from the foster parent's collateral relatives. *Kettell* v. *Baxter*, 50 Misc. Rep. 428; followed in *Matter of Haight*, 63 id. 624. A similar construction of statutes relating to adoption is found in the decisions of other states (*Hockaday* v. *Lynn*, 200 Mo. 456; *Keegan* v. *Geraghty*, 101 Ill. 26; *Quigley* v. *Mitchell*, 41 Ohio St. 375), and I should feel bound to hold that Dorothy Hoyt is not entitled to participation as "next of kin" of Reuben M. Hoyt, except for the recent announcement of the law in *Carpenter* v. *Buffalo G. E. Co.*, 213 N. Y. 101. In that case the question was presented as to the right of collateral relatives of the foster parent to take as "next of kin" of the adopted child, and the court held that the right of succession existed, saying: "It is argued by appellant that the omission of the legislature to provide that the right of inheritance extends to the heirs and next of kin of the adoptive parents is significant, as the right of inheritance possessed by the child and which passes to his next of kin was the right of inheritance from the foster parents. Reading the several laws enacted in this state, the conclusion is irresistible that the policy of the legislature has been to extend the artificial relations created by adoption to the relation existing by nature. We do not think that the statute is susceptible of the construction urged by appellent. The death of the foster parent did not re-establish the relation of par-

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ent and child between the natural parents and the intestate. The natural parents had surrendered all paternal and maternal ties to the adoptive parent pursuant to the law of the state which defined the legal rights of all of the parties and by which they were severally bound, unless the adoption was abandoned or changed pursuant to law, for which ample provision was made. When the legislature provided that the heirs and next of kin of the adopted child shall be the same as if he were the legitimate child of the person adopting, it clearly used the words "legitimate child" in the well-established meaning of the term as a child born in lawful wedlock, and effectively embodied in the law of descent a provision that the adopted child was the heir at law and next of kin of the adoptive parent to the same extent as though the adoptive parent in this case had borne the adopted child, with all that the term 'mother' implies." I do not take the view that these expressions of the court were given in a limited sense, because of the further discussion in the opinion as to the propriety of this broad construction of the adoption statute, to avoid a conceivable case of escheat should collateral relatives of the foster parent be excluded from participation. The possibility of escheat afforded an illustration that a strict construction of this statute, to exclude collaterals, was not in harmony with the legislative intent, but that intent was found as well from the general course of legislation and from the state of judicial expression upon the subject in the line of cases cited by the court. If this statute is to be read as allowing representation by collaterals through the foster parent, as was held in the case cited, its scope and meaning are such as to include the precisely correlative right of the foster child to take by inheritance through the foster parent from collateral relatives. Strictly construed, the statute excludes representation in both instances. Construed to give heritable blood by adoption in one

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instance it must give it in the other, according to every reasonable implication of legislative intent, and I hold, therefore, that this adopted child was one of the "next of kin" of Reuben M. Hoyt under the deed of trust before me. Passing to the claim of the defendant Vavis P. Hoyt, the widow of Reuben M. Hoyt, I am of the opinion that she can take no share of the remainder. The use of the words "next of kin" in connection with the phrase "in the manner and proportions directed by the laws of the State of New York for the distribution of the estates of persons dying intestate," have a controlling meaning which excludes the widow. The point has been directly ruled (*Matter of Devoe*, 171 N. Y. 281; *Luce* v. *Dunham*, 69 id. 36) and a different intent cannot well be found by resort to the additional clause in this instrument (referring to a first wife): "But in no event shall any portion of said principal become the property of Charlotte M. Hoyt, wife of my son Reuben M. Hoyt." The argument is that this clause indicated the need of words to exclude a widow in the mind of the grantor; hence, that only the wife named, but who is not the widow, was excepted. On the other hand, there is the inference, quite as persuasive, that the grantor employed these words simply to express with greater particularity the very intention which it has required judicial interpretation to evolve from the prior technical words of the deed. She meant to exclude her son's widow, and she directed accordingly. Had she contemplated the probable death of the wife named and a second marriage, then the clause in question might be construed as intending to exclude only the first wife, but her state of mind upon this subject is not indicated by the instrument, and the inference is, of course, that she was referring to the then wife as the expected widow. So read, the clause in question is simply in harmony with the general words employed in the deed, from which the intent to exclude any widow is

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implied by law. I conclude that the defendant Dorothy Hoyt is entitled to share in the distribution of the fund, and that the defendant Vavis P. Hoyt is not. Findings and judgment may be submitted in accordance with this opinion, on notice of settlement.

Judgment accordingly.

UNITED TRACTION COMPANY, Plaintiff, *v.* JOSEPH S. DROOGAN, Individually and as President of Division 148 of the Amalgamated Association of Street and Electric Railway Employes of America; JAMES H. PRIOR, Individually and as Treasurer of Division 148 of the Amalgamated Association of Street and Electric Railway Employes of America; JOSEPH F. MCLOUGHLIN, Individually and as President of Division 132 of the Amalgamated Association of Street and Electric Railway Employes of America; JAMES HARRINGTON, Individually and as Treasurer of Division 132 of the Amalgamated Association of Street and Electric Railway Employes of America; CHARLES ERDT, WILLIAM HIENEY, WILLIAM MURRAY, MAURICE FLINN, JAMES HINES, PATRICK MCKEON, THOMAS SIVERS, ABRAHAM KAISER, JOHN DELANEY, MATTHEW BURKE and ARTHUR MARTIN, Defendants.*

(Supreme Court, Albany Special Term, March, 1921.)

Injunction (temporary) — continuation of — strikes — organizations engaged in strikes responsible for all lawlessness growing out of strikes which they could have avoided by reasonable discipline imposed upon their members — an injunction will not be vacated upon affidavits where the acts enjoined are illegal and tend to a breach of the public peace, although the alleged facts upon which the injunction is based are substantially denied by the opposing affidavits.

MOTION to continue a temporary injunction.

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Austin, McLanahan & Merritt (Walter Gordon Merritt and H. Preston Coursen, of counsel), for plaintiff.

John F. Murray & Wm. H. Murray (John F. Murray, of counsel), for defendants.

HINMAN, J. This is a motion to have continued during the pendency of this action the temporary injunction issued herein on March 23, 1921.

The "law of strikes" is so well settled in this state in relation to the acts herein sought to be enjoined that it is unnecessary to more than examine the case presented here to see whether the plaintiff has established a sufficiently strong *prima facie* case to bring it within the principles which the courts have applied in granting temporary injunctions.

After a careful examination of the law and of the facts presented by the papers before me, I find no reason for denying the continuance of the present injunction during the pendency of the action. The present injunction restrains only unlawful acts which the courts have thoroughly condemned in the conduct of a strike and this strike has been attended by such prolonged and notorious and general disorders of the character sought to be restrained that the necessity for the exercise of the restraining power of the court is plainly indicated.

The sole question is as to whether responsibility should attach to the defendants. This, however, became relatively unimportant, since this injunction restrains only that which is unlawful. It is not apparent therefore why its vacation or substantial modification would be of any benefit to the defendants. I am unwilling to believe that, in their desire to embarrass the plaintiff, the members of these unions, except perhaps a comparatively small percentage of them, desire to commit such acts as will subject themselves

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to prosecution for violation of the criminal laws. It is a matter of common knowledge and popular significance that since the issuance of the present restraining order against the unions, and the other defendants, the lawlessness complained of has practically ceased. If such a result can be obtained out of respect for the authority of a court of equity seeking to preserve the rights of both parties by enforcing lawful conduct, it is much better, much kinder, more humane than to resort to the club of the policeman or the bayonet of the militia or to resort to criminal prosecution only after the commission of the offense and after the injury has been done.

It cannot be denied that the notorious conditions of lawlessness which had existed had been carried on to further the purpose of the unions and the strikers, whether committed by the strikers or by lawless strangers who gathered to look on, to sympathize and to aid. It was an incident of the strike which they were conducting.

Several newspaper clippings have been presented to me by counsel for the unions in an attempt to show that McLoughlin, president of the Troy Union, urged the members to refrain from lawless acts but the only one containing any date reveals a date subsequent to the time when this court undertook to exercise its powers in behalf of law and order. If they did not exercise their influence or power to correct the irregularities or disavow the acts until such action of the Supreme Court, when overt acts practically ceased, that, considered with what defendants did do, confirms the conclusion that the lawless acts were within the control of the defendants even if not done with their authority.

The courts hold that organizations engaged in strikes are responsible for all lawlessness growing out of strikes which they could have avoided by reasonable discipline imposed upon their members, by pub-

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licly counselling that peaceful means alone be used, by protesting against and disavowing lawlessness, by taking such reasonable measures as may be at hand to assist in preventing or punishing it, and by doing all of these things unequivocally and in good faith. *Southern Railway Company* v. *Machinists Union,* 111 Fed. Repr. 49; *Union Pacific* v. *Ruef,* 120 id. 102; *Allis Chalmers Co.* v. *Iron Molders' Unions,* 150 id. 155; *Alaska Steamship Co.* v. *International Longshoremen's Association,* 236 id. 964; *Kroger Co.* v. *Retail Clerks' Protective Association,* 250 id. 890.

But irrespective of what advice, if any, against lawlessness was given, unlawful acts were committed by members of the unions and by some of its officers according to the numerous affidavits submitted by the plaintiff. While the defendants have submitted affidavits denying or seeking to minimize the effect of the moving affidavits, the courts have held that an injunction will not be vacated upon affidavits where the acts enjoined are illegal and tend to a breach of the public peace, although the alleged facts upon which the injunction is based are substantially denied by the opposing affidavits. *Michaels* v. *Hillman,* 111 Misc. Rep. 284; *Davis* v. *Zimmerman,* 91 Hun, 489; *W. P. Davis Machine Co.* v. *Robinson,* 41 Misc. Rep. 329; *Foster* v. *Retail Clerks I. P. A.,* 39 id. 48; *Schlang* v. *Ladies Waist Makers Union,* 67 id. 221; *Pre Catelan, Inc.,* v. *International Federation,* 114 Misc. Rep. 662; *Skolny* v. *Hillman,* 114 id. 571.

I have no doubt whatever that the great majority of strikers involved here are worthy, well disposed, law abiding citizens, but unlawful acts of any of the members of either union were committed for the purpose of carrying out successfully the object of the union, that is, to secure a successful strike, and every member of the unions is responsible for the acts of the others and particularly for the acts of any officer.

In *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U. S.

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229, the Supreme Court of the United States said: "* * * when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them." See also *Coon Co.* v. *Meinhart,* 112 Misc. Rep. 650.

The charges made against the defendant McLoughlin, president of the Troy Union, by O'Brien and those who corroborate him are particularly significant and serious. McLoughlin admits being present when O'Brien and his associates were almost killed by a mob while repairing a line in Troy on February eighth last. A different complexion is given to the incident by McLoughlin but the defense has failed to submit any affidavit of Ingram, the police officer who figured in the case. He could substantiate McLoughlin's assertions if they were true and the failure to secure his affidavit and present it here tends to discredit the theory of the defendants and to give credence to the story of O'Brien and his associates.

I could analyze the other conflicting affidavits but it would serve only to unnecessarily burden this opinion for the purpose of proving what has been amply demonstrated, namely, that the only acts to be enjoined are clearly unlawful acts and that the present restraining order, which has been such an efficacious remedy in the interest of peace and good order, should be continued *pendente lite.*

The defendants' attorneys raise a special objection as to the sufficiency of the complaint. Paragraph 13 of the complaint sufficiently alleges the liability of the unions and their members, however, and this question has recently been passed upon in *Skolny* v. *Hillman, supra,* where the authorities are collated.

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An order may be entered continuing the present injunction during the pendency of the action, except as against William Hieney, William Murray and Maurice Flinn, who have been made defendants individually, but who have not been served with the moving papers, and as against Abraham Kaiser individually, who in an affidavit claims that he was tried on a charge of throwing a stone at a trolley car and was discharged by Police Justice Byron of Troy after a hearing on said charge. It is undenied that the said Kaiser is a former employee of the plaintiff. As a member of one of these unions even though he is not continued as a defendant herein individually the injunction continues to be binding upon him as well as against all other members of these unions.

The injunction continued hereby is as follows:

"That the defendants and each of them (except the defendants William Hieney, William Murray, Maurice Flinn and Abraham Kaiser individually) and their agents, servants, attorneys, confederates and any and all persons acting in aid of or in conjunction with them are and each of them is enjoined and restrained during the pendency of this action from illegally combining, agreeing or conspiring together in any manner to interfere with, injure or destroy plaintiff's good will, trade and business by unlawfully inducing or attempting to induce any person not to work for or patronize plaintiff for the purpose of preventing or obstructing plaintiff in the operation of its street railways until such time as it will pay a confiscatory wage; by in any manner obstructing or unlawfully interfering with plaintiff in securing employes or patrons; by in any manner destroying or injuring plaintiff's cars, equipment or other property; by annoying, harassing, ridiculing, threatening, frightening or assaulting any person or persons for the purpose of inducing them to leave the employment of or not to seek employment with plaintiff, or for the pur-

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pose of inducing them not to patronize plaintiff by becoming passengers on plaintiff's cars, or calling them vile or disagreeable names; by picketing, gathering or congregating in crowds or groups around plaintiff's cars on the public highways or at any other place for the purpose of assaulting, annoying, intimidating or interfering with the employes, prospective employes of the plaintiff, or any person or persons who desire to patronize plaintiff by becoming passengers on plaintiff's cars; by making any false, misleading or untrue statements to any person, firm or corporation for the purpose of preventing plaintiff from securing public patronage or employes, or by inflicting or threatening to inflict any detriment, disadvantage, inconvenience or annoyance of any kind to any person because of relation to or association with plaintiff.

"By attempting to do any of the aforesaid acts."

Ordered accordingly.

CHARLES W. MYERS and FRANCES J. MYERS, Claimants, *v.* STATE OF NEW YORK.

Claim No. 15040.

(State of New York, Court of Claims, April, 1921.)

Highways—state liable in damages for elevating grade of highway—Brooks* v. *State of New York*, 189 *App. Div.* 24, *followed.

CLAIM for damages to real property.

Morehouse, Mizen & Morehouse, for claimants.

Edward M. Brown, Deputy Attorney General, for state.

ACKERSON, P. J. The claim herein was filed for the purpose of recovering damages from the state alleged

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to have been sustained by the claimants by reason of injuries to the real property of which the claimants are and have been for upwards of four years last past the owners. The premises in question are in the village of Minetto, in the county of Oswego. They are situate upon the main street of the said village, known as the West River road and extending to the center of the street or road. There are two houses upon the premises which front east towards the road. The road runs in a northerly and southerly direction and substantially parallel with the Oswego river and but a few rods west of the west edge of the river.

In canalizing the river in the course of the construction of the Barge canal, the state built a dam across the river at a point some rods north of and down the stream from the claimants' premises, whereby the water of the river opposite the premises in question was raised eleven feet higher than its former level. By reason of this raising of the level of the water in the river, it became necessary to raise the level of the highway in front of the claimants' premises to prevent the said highway from being flooded by the waters of the river. Or as the claimant herein contends, it became necessary to build a dyke or barrier upon the highway in front of their premises and extending some rods in a southerly direction upon said highway in order to confine the waters of the river and prevent them from spreading over a large amount of territory, The highway was then reconstructed on the top of this embankment.

Before this new construction was made by the state, the highway in front of claimants' premises was slightly lower than the natural surface of the ground around claimants' houses and where the sidewalk was located in front of same. After the grade of the highway in front of the claimants' premises was raised by the state, as aforesaid, the surface thereof was about forty-three inches higher than the elevation of

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the land about and in front of claimants' houses. It appears from the evidence in this case that it thereby became necessary for the claimants in order to place their premises in the same situation in reference to the highway that they were before this improvement was made, to raise both houses forty-three inches and to carry the foundation walls thereof up forty-three inches; also to raise the sidewalk in front of said houses and the surface of the lot around said houses about the same distance and to fill up the depression between claimants' houses and the traveled portion of the new highway, in order to make claimants' houses again accessible to the highway as they were before the improvement was made. The elevation of the grade of the highway which was necessitated at this place by reason of Barge canal construction commenced in front or a little to the north of claimants' premises and extended in a southerly direction for several hundred feet. The grade of the highway some distance south of the claimants' premises was elevated five or six feet.

The question of the liability of the state for elevating the grade of this highway at the place in question was determined adversely to the claimants who filed claims against the state for damages by reason of the elevation of such highway in the case of *Brooks* v. *State of New York,* 13 St. Dept. Rep. 38; 17 Court of Claims, 77. That decision of this court, however, was reversed by the Appellate Division of the Supreme Court, third department, which is found reported in 189 Appellate Division at page 24. Until that decision by the Appellate Division is overruled by the Court of Appeals, it is mandatory upon this court and we must consider it the law applying not only to the claim of *Brooks* v. *State of New York,* but to all other claimants damaged by the construction in question. Although the dissenting opinion of Justice Woodward in the *Brooks*

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case expresses the view which we think the court should take of the law applying to the questions raised in this case and is, as we believe, in accordance with what the Court of Appeals held in the case of *Warner* v. *State of New York*, 132 App. Div. 611; affd., 204 N. Y. 682, yet, we must be governed by the majority opinion in the Appellate Division in the case of *Brooks* v. *State of New York* and proceed to award the claimants herein damages which they have suffered by reason of this change in grade of the highway in front of their premises. After a careful consideration of the evidence in this case, we find that the claimants have been damaged in the sum of $600, for which amount we have made an award against the state.

WEBB, J., concurs.

Award to claimants.

BROTHERHOOD WINE COMPANY, Claimant, *v.* THE STATE OF NEW YORK.

Claim No. 16514.

(State of New York, Court of Claims, May, 1921.)

Court of Claims — jurisdiction — notice of intention must be filed within six months of accrual of claim.

CLAIM for return of excess liquor tax.

Palmer & Serles (Leslie Reid, of counsel), for claimant.

Porter L. Merriman, Deputy Attorney-General, for state.

CORWIN, J. The claimant, on June 27, 1918, paid a tax assessed against it pursuant to the provisions of section 9-a of the Liquor Tax Law (Laws of 1917, chap. 623), which tax it alleges was assessed at an

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amount in excess of that actually due. This claim is to recover the alleged excess.

The claim, if any, accrued on the date the tax was paid, June 27, 1918. The notice of intention herein was filed March 5, 1919, more than six months after the accrual of the claim. This court is therefore without jurisdiction and the claim must be dismissed. *Buckles* v. *State of New York*, 221 N. Y. 418.

ACKERSON, P. J., concurs.

Claim dismissed.

BROTHERHOOD WINE COMPANY, Claimant, *v.* THE STATE OF NEW YORK.

Claim No. 16515.

(State of New York, Court of Claims, May, 1921.)

A tax voluntarily paid to the person authorized to receive it under a mistake of law without coercion or duress cannot be recovered.

CLAIM for return of excess liquor tax.

Palmer & Serles (Leslie Reid, of counsel), for claimant.

Porter L. Merriman, Deputy Attorney-General, for state.

CORWIN, J. The claimant herein was the holder of a liquor tax certificate issued pursuant to the provisions of subdivision 2 of section 8 of the Liquor Tax Law. Subdivision 4 of section 9-a of said law (added by chapter 623 of the Laws of 1917), required the holder of such a liquor tax certificate to file with the commissioner of excise periodical returns of the gross receipts of sales of liquors at the place or on the premises covered by such certificate, upon which

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returns a tax was assessed pursuant to the provisions of subdivision 1 of said last mentioned section. The claimant filed such a return, erroneously including therein certain receipts which were exempt from the imposition of said tax. The tax, as computed and assessed upon said erroneous return, and as paid by the claimant, was in excess of the tax which would have been assessed upon a correct return. This claim is for the amount of such excess.

The tax, as assessed, was voluntarily paid by claimant to the person authorized to receive it under a mistake of law, without coercion or duress, and claimant is therefore bound by such payment and cannot recover. *New York & Harlem R. R. Co.* v. *Marsh*, 12 N. Y. 308; *Boston M. M. Fire Insurance Co.* v. *Hendricks*, 41 Misc. Rep. 479.

The claim should be dismissed.

ACKERSON, P. J., concurs.

Claim dismissed.

KATE E. SMITH, as Administratrix of the Estate of GEORGE R. SMITH, Claimant, *v.* THE STATE OF NEW YORK.

Claim No. 15582.

(State of New York, Court of Claims, June, 1921.)

Flooding of lands — cloudburst — when state acquires right by prescription to continue flow of water over lands — claim dismissed.

CLAIM for the destruction of a dam.

Dunmore, Ferris & Dewey, for claimant.

John H. Clogston, Deputy Attorney-General, for state.

WEBB, J. This claim was made against the state for the destruction of the dam and hydro-electric plant

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owned by the claimant and located at Solsville, N. Y., on the 11th day of June, 1917. The damages were alleged to have been caused by the negligent acts of the state in the construction and operation of a section of Chenango canal whereby a large body of water which in its natural state had been tributary to and had flowed into the Chenango river running southerly, had been so diverted as to cause the same or a large portion to run northerly and to be discharged into Oriskany creek near Solsville and adjacent to the mill pond of the claimant.

The Chenango canal was authorized in 1829 and constructed from 1833 to 1840 to facilitate traffic between the cities of Binghamton and Utica. The summit level extended from Solsville on the north to the village of Hamilton on the south, a distance upwards of five miles, which level was fed by various reservoirs. A diverting dam was constructed on the north side of this system in such manner that when the water in the feeder was more than four feet high the excess flowed south into the Chenango river, when less than four feet it supplied the summit level and fed the canal extending north from that level to Utica. When more water was supplied than was taken care of by the intermediate locks, spill-ways and paddle gates were provided. Both these means of disposing of excess water were constructed at Solsville where it was discharged into Oriskany creek.

By chapter 404 of the Laws of 1877 the Chenango canal was abandoned except that portion of it on the summit level. At the north end of that level at Solsville a permanent bulkhead was constructed and that portion of the canal between that point and Utica was completely abandoned but no change was made in the feeder system of the summit level. At the point where this bulkhead was constructed the Chenango canal had formerly crossed Oriskany creek and was carried over by means of an aqueduct. With the construction

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of the bulkhead, however, any surplus water in the Chenango canal south of it ran over the spill-way into the creek as theretofore and was thus fed into Smith's mill pond. Soon afterwards the aqueduct itself was abandoned and from that time there was a constant flow of water through the old Chenango canal south of the bulkhead into Smith's mill pond, all of which furnished the power used in generating electricity for claimant's plant.

The canal at the summit level was constructed largely through a swamp and at the time it was built a dam and mill were located at the same place as in 1917. The then owner of the property made claim against the state for damages in that the construction of the canal through his swamp took away the water which had formerly reached his mill pond and thus destroyed his power. An award was made to him upon this ground, but obviously in an amount not deemed adequate by the owner, for soon afterwards the legislature directed a further hearing and an award of nearly $10,000 was made to the owner as recompense for destroying his water power. But after the abandonment of the Chenango canal there was apparently no lack of water to operate the mill, even when Oriskany creek south of the aqueduct was without water in the dry season of the year. In other words apparently the operation of the mill was at times wholly dependent for its supply of water upon the flow from the old Chenango canal.

Upon the trial the state strenuously insisted that there was nothing in the construction of the Chenango canal or the feeder system or in the use of the aqueduct or its abandonment which created any liability for the damages in question. It appeared that prior to the morning of the flood of June 12, 1917, there had been a considerable period of wet weather which had filled the ground with water. Between one and two o'clock in the morning of that day there was a cloudburst over

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the entire area covered by the feeder system. According to the testimony of the oldest inhabitants nothing so severe had ever been experienced there. The canal followed the bed of Oriskany creek a good part of the distance and high hills bounded it much of the way. The water literally poured from these hills into the creek, washed out the canal banks and ran into the bed of the old Chenango canal to such an extent as to create what witnesses called a lake, roads were washed out, a tree fifty to sixty feet long was carried away, a horse was carried from his feet by high water in the highway, timbers, logs, trees, bridges, fences, chicken-coops and debris lined the path of the flood. At three forty-five A. M. the flood was at its highest point and by four forty-five claimant's dam went out and was entirely gone.

At one A. M. the caretaker at the plant went home. The water at that time was no higher than usual and no rain was falling. It appeared by the testimony that it would take four and a half hours for flood waters to traverse the distance from the diversion dam at the north end of the feeder system to Smith's mill-pond. Inasmuch as the whole feeder system was intact, and in full operation the state urged that claimant's damages were attributable to a cloud burst against which the state was not an insurer and not to any negligence in the construction or operation of the canal or feeder system, and that such a torrent of water, flotsam, and debris would have wrecked the dam irrespective of the canal. I believe such to be the case and in our findings we have found that the claimant has failed to show that his damage was caused by any negligence of the state, which fact in and of itself would compel the dismissal of this claim.

There is, however, a further reason for exempting the state from any liability for the damages claimed to have been suffered by this claimant, which is as follows:

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It appeared that from the time when the Chenango canal was put into operation in 1840 down to 1877 when the same was abandoned, the excess waters fed into the canal from the summit level were discharged into Oriskany creek right at Smith's mill-pond; and from the time when the canal was abandoned in 1877 down to the time of the flood in 1917 all the waters coming down from that canal south of Solsville were turned into Oriskany creek and found their outlet in Smith's pond. So for a period of seventy years the owners of this property could see from their mill at Solsville the waters discharging from the canal upon their property. Winter and summer alike, in dry and wet seasons, the flow of water was continuous, undisturbed and hostile. The state was exercising an assumed right to discharge its waters in that manner for upwards of seventy-five years. For twenty-five years the claimant's decedent had depended upon that water for the operation of his industry at that point. Did the legal effect of this assumed right of the state to dispose of its waters for seventy-five years result in title by prescription? Mr. Waterman in his work upon trespass on real estate says (Vol. 2, § 631): "An uninterrupted user of an incorporeal hereditament under a claim of right for twenty years, as between parties under no disability, with the knowledge and without interruption from those adversely interested, affords conclusive evidence of a grant or right, as the case may be."

Chancellor Kent in his commentaries states that title by prescription involves a user that is hostile and continuous for twenty years and upwards and this seems to be the accepted definition. The case of *Erwin* v. *Erie Railroad Company*, 98 App. Div. 402; affd., 186 N. Y. 550, applied the doctrine to a state of facts less clear than the one under consideration and the court said respecting a continuous flow of water upon the plaintiff's land: "That act constituted an interference

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with the rights of the owner if any there were and it was an open notorious assertion of dominion in hostility to her claim. Actual damages need not follow the usurpation immediately to make a cause of action. If the natural result of the dispossession was injury to the plaintiff's property she could have sued at once to enjoin the continuance of the obstruction. But in this case the proof indisputably shows that water overflowed and ran along this depression and deluged the farm by reason of the embankment more than thirty-five years before this action was commenced. Clearly it is too late for her now to maintain her cause of action for damages."

These words might have been applied with propriety to the case in hand. For seventy-five years the waters of the Chenango canal had been flowing upon the lands of the claimant and his predecessors in title with continued regularity and in greater or less volume, and for twenty-five years those waters had been an essential element in the operation of his water power. Having discharged canal waters into Oriskany creek for that length of time it seems to me the state's right to continue that flow was acquired by prescription, and such title of the state was not affected by the fact that after its title by prescription had been perfected an excess of water subjected it to liability arising from that cause. For these reasons I advise that the claim be dismissed.

ACKERSON, P. J., concurs.

Claim dismissed.

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ADRIENNE BOATE, Appellant, *v.* GERSHOM BOATE, Respondent.

(Supreme Court, Appellate Term, Second Department, June, 1921.)

Boate v. *Boate*, 114 *Misc. Rep.* 321, *affirmed.*

Judgment affirmed with twenty-five dollars costs, on the opinion by Justice Law in the court below. See also *Charruaud* v. *Charruaud*, 1 N. Y. Leg. Obs. 134. The holding in the case of *Muhr's Estate*, 59 Penn. Sup. Ct. Rep. 393, is disapproved. No opinion.

NICHOLAS PETERS et al., Respondents, *v.* LOUISE ADAMS, Appellant.*

(County Court, Oneida County.)

Street improvements — lack of authority of public officials — one dealing with municipal authorities does so at his own risk — property owner not liable directly to contractor for improvements — evidence.

APPEAL on questions of law from a judgment in favor of the plaintiffs and against the defendant, which judgment was rendered in Justice's Court in the city of Utica.

W. H. Weller, for appellant.

William F. Dowling, for respondents.

HAZARD, J. It appears that defendant is a resident and presumably a property owner on College street

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in the village of Clinton in this county, and at some time in the year 1917 proceedings were had which led up to the pavement of that street. Apparently the building of the curbing was not included in the paving contract. It seems that sometime after the paving job was completed the village trustees decided to have curbing put in along the street on either side. It does not appear that any of the formal steps necessary to official action of this sort were taken, in fact, it is conceded that the proceedings were irregular, or as one of the officials who was a witness described it, "it was an unofficial proposition." It seems to be conceded that so far as enforcing payment by means of an assessment is concerned, the proceedings were irregular and invalid, and no attempt is made so to do. Whether some of the property owners may or may not have consented to the erection of the curbing does not appear, but it is clear that this defendant did not. Without any authority from anyone, and without taking any legal steps, the trustees authorized the plaintiff's firm to erect a curbing along the street in question. This the plaintiff's firm proceeded to do, and this action is brought to recover of this defendant what is claimed to be her proportionate share for the work and materials. The question is thus presented as to whether the defendant, under the circumstances briefly outlined above, can be compelled to pay.

It is not claimed that the officials who authorized this work and employed the plaintiffs had any legal or inherent authority as such to do it so as to bind this defendant. Neither is it claimed that they were in any way authorized by the defendant to contract for her, and the theory upon which the recovery is sought to be sustained is "That if a person allows another to work for him under such circumstances that no reasonable person would suppose that the latter meant to do the work for nothing, he will be liable to pay for it." It is true that there are certain cases, which

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we will consider later, in which some such a principle as above stated has been laid down and followed, but in none of these cases cited by the respondent were the facts at all similar to these. No case of this state, at least, has been cited which is at all closely parallel. *City of Davenport* v. *Allen*, an Iowa case, is perhaps the nearest in point of any of the cases cited by the appellant, but that case was one brought by the municipal authorities upon a contract involving an illegal assessment, and under an Iowa statute. The case is to be differentiated, *first*, because this action is not brought by the municipal authorities who authorized the work. *Second*, there is not any New York statute similar to sections 478 and 479 of the Iowa Code. Clearly, the case is not an authority for the plaintiffs here to bring such an action as this.

Coale v. *Suckert*, 18 Misc. Rep. 76, is a case where there *was* a contract of employment between the plaintiff and two defendants, and the court held that an agreement between the defendants to divide the plaintiff's bill was not binding upon the plaintiff, that the parties were jointly liable.

Moriarty v. *Board of Education*, 112 App. Div. 837, was a case where the plaintiff had undoubtedly been employed by one of the defendants who was a general contractor. It is to be observed that a judgment against the defendant was reversed. It is certainly no authority for what the plaintiff contends for here.

Worthington v. *Worthington*, 100 App. Div. 332, was an action by a corporation against its president and has apparently no particular bearing upon the question at issue.

Crane v. *Gamung*, 89 App. Div. 398, was a case in which the plaintiff testified that the defendant specifically requested the services from him, etc. Nothing like this appears in the case at bar.

Williams v. *Hutchinson*, 3 N. Y. 312, was a case

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where services were rendered by one member of a family for another, a situation entirely remote from that in the case at bar. About the same is true of *Ploger* v. *Bright,* 119 N. Y. Supp. 628.

I have considered the foregoing cases in detail because they are cited as authority for the plaintiff's contention. It is true that isolated sentences might be picked out of some of these cases which might tend to establish that if a person permits another one to work *for him* under circumstances from which a reasonable man might assume that the services were not gratuitous, that he would be compelled to pay for them. The plaintiffs were not working for the defendant. They had no semblance of authority from her. Their employment came from the village authorities who it is conceded had no authority to act as they did either as officials or as representing the defendant.

The plaintiffs sued upon an express contract. Their proof did not at all establish the cause of action set forth in their complaint. Item after item of evidence was received over the objection of the defendant, and in many of these instances the ruling constituted reversible error. These items are so numerous that I will not undertake to go into them in detail.

It is claimed on the part of the respondents here that the defendant acquiesced or "accepted the services," and it is, therefore, claimed that she should, therefore, be compelled to pay for them, whether they were authorized or whether she wanted them or not. I do not think this proposition is sound. In the first place, the work was not done on her premises. It was done in a public highway over which we must assume the village authorities had control. *Secondly,* it was done under the authority and direction of the village authorities. The defendant was, therefore, not in a position to forbid the work going on. She was not called upon to forbid or otherwise restrain it. This brings us to the item of the evidence wherein the ques-

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tion was asked, "You didn't get an injunction?" This was objected to and the court overruled the objection. I consider this ruling a reversible error. The jury heard the question asked, the objection made and heard the ruling, and were, therefore, led to believe and were warranted in believing when the court ruled as it did that it was the business or duty or there was some obligation on the part of the defendant to institute injunction proceedings to restrain these plaintiffs from doing certain things in the highway in front of her house. This was a serious error.

Another serious error was committed by the court when at the close of the plaintiff's case one of the jurors inquired: "Were Mr. Brockway and Dr. Taylor the village authorities?" The court replied that "They were the president and clerk, but this action is based not on any statutory proceedings, but on an implied contract." I think the court should have either declined to answer the question, or should have explained as he was requested to do that the fact that they were village officials did not *per se* authorize them to make contracts binding upon property owners in the village, other than in the manner provided by statute. It is extremely doubtful if the jury appreciated the difference between an express and an implied contract and as to how that difference would apply to this case. The court permitted them to assume that the work was authorized by "the village authorities," and I think therein it committed an error.

It seems to be a fact that after the work was done and while measurements of frontages were being taken by the village clerk Brockway, he requested the defendant to exhibit her deed. She did so, and it is claimed that some importance is to be attached to that fact. However, it stands undisputed in the case that before she did so she stipulated that it was without prejudice to herself. No acquiescence could be spelled out of that transaction between the village clerk and herself

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so as to bind her for the work which the plaintiffs had done, because, if for no other reason, she specifically stipulated that no such effect should be given to it.

With reference to the proceedings in the court below, I think the most flagrant error committed, and I am compelled to look upon it as a flagrant error, was in receiving in evidence a letter written by plaintiffs' attorneys to the defendant shortly before the suit was brought. In that letter the plaintiffs' attorneys said: "The liability of the abutting owners for this improvement was determined in the case of *Peters* v. *Keith*, which was tried before the Supreme Court and a jury here in Utica last Tuesday. The jury found a verdict in favor of the Peters Company for the full amount claimed." Whatever might have been the facts in the *Keith* case I do not know. It is said that they are clearly to be differentiated from the facts in this case, but be that as it may, there can be no doubt that inasmuch as this defendant was not a party to that suit, the adjudication is not binding upon her. However, the statement which was thus got before the jury that the Supreme Court had decided that abutting owners were liable for this curbing, was most highly prejudicial to this defendant, and, in my judgment, alone constitutes reversible error. It is claimed that it was offered, and in fact the court said it was received only for the purpose of showing a demand. We will pass up the question of whether it was necessary to prove a demand in this case or not, and be that as it may, the plaintiffs had no right to incorporate into the case other illegal evidence under the guise of a demand. If they saw fit to include in that "demand" illegal matter or matter which should not have gone before the jury in this case, and they very surely did that, the letter should not have been allowed to go before the jury. Plaintiffs' attorneys could not legalize what was otherwise illegal, and clearly so, by mak-

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ing it a part of an alleged demand. If they thought a demand was necessary, they should have made the demand in a proper manner as was entirely within their power to do.

It is urged with earnestness and force that the defendant has had the benefit of the plaintiffs' work and as a matter of justice should be compelled to pay therefor. With this proposition I have no quarrel, but after mature deliberation I am entirely convinced that the plaintiffs had not a cause of action against this defendant. They saw fit to accept employment from the village officials who concede "they were acting unofficially." They dealt with municipal authorities without ascertaining their authority, and it is fundamental that one so dealing does so at his peril. He is bound to inquire and to know if the authority exists and if the regular steps have been taken. This the plaintiffs entirely failed to do. Apparently they went ahead without any investigation and probably without any inquiry. They "took a chance," and it now transpires that their employment was entirely unauthorized so far as this defendant is concerned. I am obliged to decide that under the circumstances as established by this case they cannot recover, and their complaint should have been dismissed when the motion was made at the end of their case. The judgment must, therefore, be reversed.

Judgment reversed.

Matter of the Estate of WILHELMINA GINDLER, Deceased.

(Surrogate's Court, New York County, April, 1920.)

Executors and administrators — preferred legacy paid in part upon giving bond — Code Civ. Pro. §§ 2687, 2688.

APPLICATION for the payment of a preferred legacy.

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William C. Morton, for petitioner.

Peter Cook, for executor.

FOLEY, S. This is an application by a legatee under section 2687 of the Code of Civil Procedure for the payment of a preferred legacy in the sum of $4,000, together with a portion of the interest on a certain mortgage directed to be paid to petitioner by the will.

The petitioner's legacy of $4,000 is in the same class with other preferred legacies amounting to $13,000. These legacies are directed by the eighth paragraph of the will to be " paid in full before the payment of any of the other legacies herein directed to be paid by my executor so soon after my decease as is permitted by law, out of any money then in his hands."

Letters were issued in July, 1919. Publication of notice to creditors has been completed, but the executor has not yet accounted. The executor shows that he has not in his hands at the present time sufficient funds to pay the preferred legacies in full. He has $13,318 in cash. A claim in the amount of $2,400 has been filed against the estate. Funds must also be reserved for administration expenses. It appears, therefore, that not more than half of the preferred legacies can properly be paid at this time. I am of the opinion that the rights of all persons interested, who are not parties herein, will be amply protected if the executor is directed to pay one-half of the petitioner's preferred legacy upon the petitioner's giving a bond as provided in section 2688 of the Code of Civil Procedure. The petitioner is also entitled, by the express terms of the will, to his proportionate share of the interest on the mortgage collected by the executor since the death of the testator.

Former attorneys for the petitioner in the probate proceeding file an affidavit and request the court to

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order that any money payable to the petitioner be paid in a manner which will protect said attorneys. This court has no power to make such a direction. These attorneys do not represent the petitioner in this, a separate proceeding, and assert no lien under section 475 of the Judiciary Law. No assignment by the petitioner to them is alleged. Any rights they may have under the percentage contract of retainer can be determined in the proper tribunal. Incidentally the balance of legacy remaining unpaid is amply sufficient to protect the attorneys' lien should it be established.

The application for payment of the preferred legacy and for payment of part of the interest collected on the mortgage is granted as indicated.

Application granted.

Matter of the Estate of TERESA M. O'DONOHUE, Deceased.

(Surrogate's Court, New York County, May, 1920.)

Executors and administrators — wills — bequest in lieu of commissions — transfer tax — when amount of commissions not deductible — Tax Law, § 226.

APPEAL from an order assessing the transfer tax.

John Delahunty, for executors.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for State Comptroller.

FOLEY, S. This is an appeal by executors from the order entered on the report of the transfer tax appraiser upon the ground that a deduction of the statutory commissions was not allowed by him.

The will provides: "I give and bequeath to my executor and executrices hereinafter named one thou-

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sand two hundred dollars." In the latter part of the will the testatrix appoints her three children executors and directs that "*they serve without fees.*" Reading these paragraphs together, the will must be construed as fixing $1,200 as the compensation of each executor in lieu of fees. The latter clause quoted above would then read as if the testatrix had said "they shall serve without fees, *excepting the compensation hereinbefore fixed.*" As my colleague, Surrogate Cohalan, pointed out in *Matter of Neustadter,* N. Y. L. J., Aug. 16, 1913, the executors named could have renounced their appointment and an administrator c. t. a. would have been appointed. They qualified, however, and not having renounced the specific compensation within four months from the date of their letters (Code Civ. Pro., § 2753), they must be held to have accepted the limited allowance fixed by testatrix in lieu of their statutory commissions. These commissions are estimated at $13,500 in all. Under this construction section 226 of the Tax Law does not apply, since the legacy was in lieu of commissions and was less than the amount of the legal commissions. The intent of the testatrix is clear that her estate should not be diminished for commissions by more than $1,200 for each, or a total of $3,600. *Matter of Vanderbilt,* 68 App. Div. 27, 30. Section 226 of the Tax Law reads as follows:

"Section 226. Taxes upon devises and bequests in lieu of commissions.—If a testator bequeaths or devises property to one or more executors or trustees in lieu of their commissions or allowances, or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor or trustee, the excess in value of the property so bequeathed or devised above the amount of commissions or allowances prescribed by law in similar cases shall be taxable under this article."

Several other legacies are given in the will to each

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of the persons named as executors. But the contention of the executors that they are entitled to deduct full legal commissions from these other legacies which were given to the persons nominated executors not as such, but individually, cannot be sustained. For the same reason the fees of the executors in the administration of the trusts created by the will cannot be deducted. The limited amount allowed as compensation by the testatrix and the naming of the executors as such to administer the trust indicate that the sum of $1,200 was to be their full compensation for all duties under the will.

The sum of $1,200 should therefore have been allowed as a deduction from the interest of each person named as executor. Submit order remitting the report to the appraiser for correction accordingly.

Ordered accordingly.

Matter of the Estate of DUNCAN PHYFE, Deceased.

(Surrogate's Court, New York County, June, 1920.)

Executors and administrators — when letters of administration will not be revoked — meaning of "incompetency" under Code of Civil Procedure, § 2564.

APPLICATION to revoke letters of administration.

Maurice S. Cohen, referee.

Hawkins, Delafield & Longfellow (Lewis L. Delafield, John B. Marsh, E. J. Dimock and Alfred Gregory, of counsel), for administrator.

George E. Morgan (George H. Corey, of counsel), for petitioner.

John F. Couch, special guardian.

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COHALAN, S. This is an application to revoke letters of administration. Duncan Phyfe died intestate on the 5th day of May, 1919, leaving him surviving a widow, Grace H. P. Phyfe, and two infant nephews. Edith Bell Phyfe, a sister-in-law of the decedent is the mother of the infant next of kin and their general guardian. As general guardian, she filed a petition for letters of administration upon the estate of the decedent. The petition disclosed the name and address of the widow, Grace H. P. Phyfe, who had first right to letters, but alleged the widow to be incompetent. The petition also stated that "your petitioner is informed and believes that the mental condition of the said Grace H. P. Phyfe is such that she is incapable of transacting business requiring intelligence or ordinary business knowledge, or of forming a rational judgment concerning business affairs or the care of property." A citation to show cause why letters should not issue as prayed for in the petition was duly issued to the widow and was duly served upon her. Because of the allegations of incompetency, and in pursuance of section 2530 of the Code of Civil Procedure, an order was made by the surrogate directing that a copy of the citation be delivered, in her behalf, to John F. Couch, an attorney and counsellor at law of wide experience and of high standing and ability.

The widow consulted several lawyers, but none appeared for her upon the return of the citation. She states that she intended to appear personally, but that she had stepped out of the court room and was not present when the case was called. Surrogate Fowler heard the application and marked it for decree subject to the report of a special guardian. Thereafter Mr. Couch was appointed special guardian to represent the widow. He wrote to her stating that he had been appointed special guardian to protect her interests and asked her to appoint a time when he

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could see her, either at his own office or at the hotel where she resided. She received the letter and said she did not care to see the special guardian. Mr. Couch had been informed by Mr. Towne, an attorney at law, that he (Towne) represented Mrs. Phyfe, the widow, and that he intended opposing the application for letters then pending. After waiting several days, and no action having been taken by Mr. Towne, the special guardian again saw Mr. Towne, who explained that he had prepared papers to enable Mrs. Phyfe to oppose the application of the general guardian of the next of kin and to ask that letters be issued to her, but as Mrs. Phyfe had refused to sign any papers or to follow his instructions, he would not continue to represent her. Through Mr. Towne the special guardian again endeavored to communicate with his ward, but she informed Mr. Towne that she did not care to see the special guardian. The special guardian saw two other lawyers who had been consulted by the widow after Mr. Towne had ceased to represent her, and after the special guardian had filed his report, but before the decree had been signed, he had a telephone conversation with the attorney who represents the widow in this revocation proceeding. Notwithstanding Mrs. Phyfe's industry in consulting different lawyers, there was no attempt by any attorney to appear for her in the administration proceeding. The special guardian did not file his report until 15 days after the return of the citation, having held up the matter in the hope that Mrs. Phyfe would finally take some action through an attorney of her own choice. The petition asked for the issuance of letters to two persons and a trust company. The special guardian objected to the appointment of three persons, pointing out that, as the value of the estate was more than $100,000, the payment of commissions to three persons would unnecessarily reduce the widow's distributive share. The decree was set-

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tled before Surrogate Fowler, who was fully informed of all the facts. The special guardian stated that the result of his inquiries led him to believe that the widow had been fully and properly advised, but was distrustful of her own counsel, and that she had certain ideas about the administration of the estate, principally that it should be administered in accordance with the wishes expressed by her husband in his unexecuted will. The special guardian not objecting, a decree was signed appointing as administrators the Farmers' Loan and Trust Company and Edith Bell Phyfe, the mother and the general guardian of the two infant next of kin. They duly qualified and letters of administration were issued to them.

From the foregoing it appears that the letters sought to be revoked by the widow were issued only after the appointment of a most capable and conscientious lawyer as special guardian for the widow, after he had investigated the matter as thoroughly as the vagaries of his ward permitted, and after he had stated to the court that he had no objection to the decree made. The widow was cited, was advised by at least four counsel before the decree was signed, and then did not appear in the proceeding. She knew that the surrogate had appointed counsel to act for her, and capriciously refused to see him or to communicate with him. The court was fully advised as to the situation. The decree was not signed until seventeen days after the return of citation. The special guardian took every precaution to protect the widow's rights and delayed the proceeding nearly two weeks to give her an opportunity to make up her mind what to do.

The widow now moves to revoke the letters issued and prays that she be appointed administratrix. Her petition refers to the "default of the petitioner" in the administration proceeding, and through inadvertence the decision herein announcing that a referee

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would be appointed stated that the default would be opened. No application has been made to open a default. That could be done only in the administration proceeding. This petition is entitled in a revocation proceeding, which is the only proceeding brought by Grace H. P. Phyfe, the petitioning widow. The decree awarding letters of administration was not opened and it still stands. The only ground alleged for the revocation of letters is that the decree awarding them was procured by a false suggestion of a material fact, "namely, the false statement of your petitioner's incompetency." Because of the conflict between the petition, opposing affidavits and answering affidavits as to whether Grace H. P. Phyfe was and is competent to discharge the duties of administratrix of a large estate, an order was made directing a referee to take evidence upon the question and to report said evidence with his opinion thereon to the court. The referee has reported that in his opinion the petitioner is incompetent to receive letters because of "want of understanding." Code Civ. Pro., § 2564, subd. 5. It is unnecessary to discuss the testimony. I am of the opinion that it amply sustains the conclusion of the referee. This is not a finding that the widow is insane or a lunatic or that she is generally incompetent. It is a ruling that the widow has not the requisite understanding of the duties and responsibilities that she would be called upon to exercise in administering an estate worth $150,000. The statute (Code Civ. Pro., § 2564) does not mean that the incompetency which disqualifies one for "want of understanding" must be such as would be necessary for a general adjudication of incompetency or the appointment of a committee. *Matter of Leland*, 175 App. Div. 62, 67.

If the allegations in the petition in the administration proceeding regarding the incompetency of the widow to receive letters be considered as statements

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of fact, they are sustained by the finding herein that she is not competent to act as administratrix of the estate. There was no false suggestion of a material fact. The court was fully apprised of the whole situation before letters were issued. The petition stated all the facts and the claim as to the inability of Grace H. P. Phyfe to properly administer the estate. *Matter of Shonts,* 191 App. Div. 427, 433. She was duly cited and did not ask for letters, though she consulted several attorneys during the pendency of the proceeding. If she is not incompetent, she is precluded by the decree in that proceeding. If she is incompetent, she is bound by the acts of her special guardian who, very properly under the circumstances, did not oppose the decree awarding letters to the trust company and Edith Bell Phyfe, the widow's sister-in-law and guardian of the only next of kin. Ample evidence has now been taken and upon such proof the petitioner could not have been appointed administratrix even if she had asked for letters in the administration proceeding. The application to revoke the letters of administration must be denied with costs. The question of the costs to be allowed and how they should be made payable will be considered upon the settlement of the order.

Decreed accordingly.

Matter of the Estate of CAROLINE S. GREENE, Deceased.

(Surrogate's Court, New York County, June, 1920.)

Transfer tax — shares of stock — Boston & Albany railroad — Fitchburg railroad — Tax Law, § 220.

APPLICATION by executor for order remitting report of transfer tax appraiser.

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Joseph F. McCloy, for petitioner.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for State Comptroller.

FOLEY, S. Application by the executor of the above named decedent for an order remitting the report of the transfer tax appraiser to him for the purpose of reappraising certain shares of stock owned by the decedent and of allowing deductions for the proportionate amount of the debts, funeral and administration expenses.

I do not believe that the effect of the amendment made in 1919 to section 220 of the Tax Law has changed the rule laid down in *Matter of Cooley,* 186 N. Y. 220, and *Matter of Thayer,* 193 id. 430, with reference to the unusual status of the stock of the Boston and Albany Railroad Company and the Fitchburg Railroad Company, with their double incorporation in New York and Massachusetts. The appraiser, therefore, was in error in reporting the transfer tax as due upon the entire value of the shares of the stock and should have apportioned the same.

An allowance should be made for a pro rata deduction for the funeral and administration expenses and debts of decedent.

The report will be remitted to the appraiser for revision and correction in accordance with this decision. Order signed.

Matter of the Estate of JOHN M. BOWERS, Deceased.

(Surrogate's Court, New York County, June, 1920.)

Transfer tax — deed of trust — securities under control of trustee are not "held by the decedent" — Tax Law, § 221-b.

APPEAL from order assessing the transfer tax.

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Scott, Gerard & Bowers (Francis M. Scott, of counsel), for executors and trustees of John M. Bowers.

Paul E. Whitten, for William C. Bowers and Arthur Coppell as trustees.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for State Comptroller.

FOLEY, S. There are two appeals from the order assessing the transfer tax in this proceeding, one by the executors and trustees under the will of the decedent, the other by the trustees under deeds of trust and under an ante-nuptial agreement made by decedent, on the ground that the property transferred by certain of the instruments was not subject to the ordinary transfer tax, and on the further ground that the securities forming part of the property transferred, were not liable to the tax provided for by section 221b of the Tax Law.

The decedent, in the deeds of trust, transferring the property which appellants claim is not taxable, reserved to himself, subject to the separate consent of the trustees, the power of amendment and revocation. Under these conditions the gifts must be considered as transfers which did not become absolute until his death.

It is logical to infer that the trustees, under this reservation, might have consented to the revocation or alteration of the trust at the request of the donor, and the court cannot assume that they would have absolutely refused his request to revoke. The possibility existed.

The fear expressed by the Court of Appeals in the *Bostwick Case,* 160 N. Y. 489, 494, that "if the trust transfers now in question were held to be without the operation of the act, too dangerous a latitude of action would be permitted to persons who desired to evade its provisions by some technical transfer, which would

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still leave the substantial rights of ownership in the donor," would be well founded if the donor, to escape taxation of the transfer, could provide for the additional consent of some one who might be entirely subject to his control. The power reserved to the grantor brings this case within the rule laid down in *Matter of Bostwick*, 160 N. Y. 489; *Matter of Ely*, 149 N. Y. Supp. 90, and *Matter of Schermerhorn*, N. Y. L. J., Jan. 26, 1913. The corpus of these various trusts is therefore taxable and the appeal on this ground is denied.

The securities forming part of the trusts and the ante-nuptial settlement, having been under the control of the trustees, and not "held by the decedent" (§ 221b) the obligation of paying a personal tax or having them stamped under the Investment Tax Law was on them and not, during his lifetime, on Mr. Bowers. Cooley Taxation (3d ed.), 660; Tax Law, §§ 8, 336. The provisions of section 221b, imposing a penalty for evasion or non-payment of the personal or investment tax (*Matter of Watson*, 226 N. Y. 384) are, therefore, not applicable to the securities involved here.

The report of the appraiser will be remitted to him for the purpose of revision and correction in accordance with this decision.

Ordered accordingly.

Matter of the Estate of EDWARD ACKLEY, Deceased.

(Surrogate's Court, New York County, November, 1920.)

Executors and administrators — ancillary administration — disapproval of secret stipulations entered into between parties interested in the estate — report of referee confirmed.

PROCEEDINGS upon the accounting of an ancillary administratrix.

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Julius H. Beckwith, for administratrix.

Wood, Cooke & Seitz, for objectant.

FOLEY, S. An examination of the testimony and exhibits before the referee clearly sustains the findings of fact and conclusions of law that the sum of $3,681.97 was paid with the full knowledge of the attorneys for Matilda A. Donoho, the objectant, in full settlement of her share of the Segal claim, and that the settlement was ratified and confirmed by them in her behalf. It moreover appears from the testimony of Mr. Bouvier that the settlement was an advantageous one for all the parties interested. The report of the referee is therefore confirmed, with the exception of (1) subdivision C of finding of fact 19 and conclusion of law 8 based thereon, and the latter conclusion is modified by reducing the allowance for services rendered by the New York attorneys for the administratrix in the collection of Whiteside mortgage to fifty dollars; (2) the computation of commissions appears to be incorrect and the conclusion of law 2 is overruled. The amount of commissions should be determined upon the settlement of the decree.

Finally, in disposing of this matter the court desires to express its emphatic disapproval of the secret stipulations entered into between the parties prior to the entry of the decree of this court of February 24, 1913. The decedent left him surviving his widow and one sister, Matilda A. Donoho. Original letters of administration were issued to the widow in Connecticut, where the decedent last resided. The widow was also appointed ancillary administratrix in New York state. The sister made claim against the estate for the sum of approximately $92,000, the nature of which has not been disclosed in any of the proceedings. The entire estate was much less than the amount of this

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claim. On January 31, 1913, just prior to the submission of the prior accounting by the ancillary administratrix, the widow and sister entered into an agreement providing that, in consideration of the allowance of the claim in the full amount by the ancillary administratrix, the sister and widow would divide the estate equally. The agreement further recited that the settlement was made in anticipation of the entry of the decree. This stipulation was concealed from the surrogate, and the decree entered on February 24, 1913, upon the prior accounting, directed payment of the entire proceeds of the estate, including the amount of the Segal claim when collected, to the sister as a creditor. The consent to the entry of the decree was subscribed and acknowledged by both the widow and the sister, and the consent further provided: "It being particularly understood that the following items set forth therein are correct, namely, the disposition of the claim against Adolph Segal as set forth therein." This consent to the entry of the decree was dated February 18, 1913, which was eighteen days after the agreement between the administratrix and Matilda A. Donoho to divide the whole estate, and particularly the Segal claim, equally between them. The evil results of permitting secret agreements in the settlement of an estate, involving the allowance of a claim by the administratrix larger than the entire estate, whereby the rights of other creditors and other distributees would be prejudiced, are apparent. Under such agreements, too, the state of New York, or the state of decedent's domicile, would be defrauded of the payment of the transfer tax justly due. The division of the funds paid on the sister's claim served to conceal the actual transfer of a large amount to the widow. In the present estate the transfer tax to the state of Connecticut appears from the order in evidence, dated March 20, 1913, to have been underpaid. That order reads: "Upon

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the accounting of the administratrix of said estate, it appearing to and being found by this court that all the personal assets have been paid and expended *in the payment of claims* and expenses of administration in this state and elsewhere," and further recited, "that the widow's share therein being less than $10,000 is exempt." It appears that the widow received approximately $30,000 as her share of the estate. Section 2735 (former section 2743) of the Code of Civil Procedure, provides that a decree on a judicial settlement of an account "must direct the payment and distribution thereof to the persons so entitled according to their respective rights." The suppression of this agreement, prior to the entry of a decree (entirely inconsistent with its terms), might well induce the court in this proceeding to leave the parties where it finds them and allow them to disentangle themselves from the meshes in which they have become involved by their agreement. *Hocking Valley R. R. Co.* v. *Barbour,* 190 App. Div. 341; *Barry* v. *Mulhall,* 162 id. 749, 751. The result, however, in this proceeding is the same, and in order to make final disposition of the issues between the parties the report of the referee has been confirmed as indicated above.

Ordered accordingly.

Matter of the Estate of WILLIAM H. BROWN, Deceased.

(Surrogate's Court, New York County, December, 1920.)

Interest on legacy should be paid from one year after the grant of letters — interest on trust fund from date of death of testator — rate of interest.

PROCEEDING upon the accounting of a trustee.

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Thompson, Freedman & Cook, for petitioner.

Miller, King, Lane & Trafford, for respondent.

Edward R. Otheman, for Fidelity Trust Company.

James C. Linden, for Howard Chichester.

Hedges, Ely & Frankel, for Hospital of the Protestant Episcopal Church in Philadelphia.

FOLEY, S. The net amount of the trust fund bequeathed to Fidelity Trust Company was $48,276.40. The *cestui* is entitled to the income earned thereon from the date of the death of testator to the date when the fund was set up, and the decree should so provide. *Matter of Parkin,* 190 App. Div. 875; *Matter of Stanfield,* 135 N. Y. 292. Interest on the legacy to Howard Chichester should be paid from one year after the grant of letters. Interest should be figured on both of these legacies at the rate earned on the entire estate during that period. The delay was not occasioned by any neglect of the executor. The estate was in litigation, and the title to the whole estate was involved. The account shows that both the legacies were paid as soon as the executor could properly do so.

Decreed accordingly.

Matter of the Estate of HENRIETTA OBST, Deceased.

(Surrogate's Court, New York County, December, 1920.)

Executors and administrators — accounting — abatement of legacies — specific legacy preferred — interest on trust fund to be set up from sale of lands dates from the time within which sale was directed to be made.

PROCEEDINGS upon the accounting of an executor.

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Solinger & Solinger, for executors.

Hamilton & Freeman, for objectant Marietta Kerns.

Paul H. Burns, special guardian.

Harold Swain, for Title Guarantee and Trust Company.

FOLEY, S. The twenty-six legacies bequeathed by the testatrix in paragraph twelve of her will payable out of the proceeds of the sale of the real and personal estate are all in the same class. The proceeds of the sale of the real estate are insufficient to enable the executor to make payment of these legacies in full, and accordingly they must abate ratably amongst themselves. The legacy of the income on $3,000 in trust for the benefit of Marietta Kerns, the widow of the deceased son of the testatrix, is a specific legacy. *Matter of Matthews,* 122 App. Div. 605. It also partakes of the nature of a demonstrative legacy, being payable out of a specified fund. *Crawford* v. *McCarthy,* 159 N. Y. 514. In either case it is entitled to a preference. The daughter-in-law resided with the testatrix, and appears to have been a special object of her bounty. No other provision was made for her. The codicil contains a clear and unequivocal expression of the testatrix's intention to prefer this legacy to the widow of her son over any of the others. *Matter of Lloyd,* 166 App. Div. 1. This legacy should therefore be paid in full.

The trustees were directed to set up this trust out of the proceeds of the sale of the two houses and to make the sale within three years after the death of the testatrix, and payment of the legacies was postponed until that time. Interest should therefore be paid to Marietta Kerns from a day three years after the death of the testatrix. No objection has been

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made to the executor withholding the real estate from sale for a longer period, but it should not deprive this legatee of income from the day designated in the will. As the money in the hands of the executor is insufficient to pay the legacies in full, no interest can be allowed on the other legacies.

Ordered accordingly.

Matter of the Estate of MARIE HAUSELT, Deceased.

(Surrogate's Court, New York County, December, 1920.)

Executors and administrators — temporary administrator should account before making distribution.

APPLICATION by a temporary administrator to distribute.

Hunt, Hill & Betts, for petitioners.

FOLEY, S. This application by the temporary administrator to distribute what is in effect the entire balance of the estate is denied. It is contrary to the practice of this court and contrary to the law to authorize a distribution of this kind on an *ex parte* application. The estate originally amounted to $31,000, of which nearly $21,000 has already been paid out. The transfer tax has not been paid or even determined. The temporary administrator should follow the usual practice, file his accounting and cite the necessary parties. The very title of his office defines the limitations on his functions and duties. To make a distribution of the balance by order in the manner here sought might result in leaving no assets for the creditor whose claim has been filed and rejected. Although the time of the creditor to sue thereon may have expired, as stated in the moving

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affidavit, the creditor has the right to have his claim determined and if allowed ordered paid upon the accounting of the temporary administrator. Code Civ. Pro., § 2681.

Application denied.

Matter of the Estate of EMMA L. TYRRELL, Deceased.

(Surrogate's Court, New York County, January, 1921.)

Husband and wife — the burden of proving the invalidity of a second marriage is upon the one who asserts its invalidity — equitable jurisdiction of Surrogate's Court — evidence — accord and satisfaction.

MOTION to vacate decree granting letters of administration.

Edward F. Clark (Leonard J. Reynolds, of counsel), for petitioner.

George A. Knobloch (Loring M. Black, of counsel), for executors.

FOLEY, S. Motion to vacate decree granting letters of administration upon the ground that the decree was procured by fraud. It is claimed that the administrator (now deceased) had a wife living at the time of his marriage to intestate. Dr. Charles A. Tyrrell married the decedent, then Emma Lynas, a resident of Indiana, about thirty years ago. No positive evidence has been given to fix the date or place of this marriage, but a child was born to the couple in New York city on December 21, 1895. This child died shortly afterwards. The parties lived together up to a time when the intestate became insane. She died in September, 1917. Previously to this marriage, and in 1881, Dr. Tyrrell had married one Eliza

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Glaister in Australia. There was a son born of this marriage, and the first Mrs. Tyrrell and this son are both living. They lived together at Sydney, New South Wales, from 1881 to 1884. Subsequently Dr. Tyrrell left Australia and came to America. Dr. Tyrrell explains the circumstances of his second marriage in his will as follows: "For the purpose of explaining a condition which has recently arisen, I state that I was married to Eliza Glaister Tyrrell, in Australia, and after living with her for several years she disappeared, and although I thereafter made due and diligent search and inquiry for her I could not locate her or ascertain if she was alive, and years afterwards I was advised by my lawyer that I could legally marry." It appears further that Dr. Tyrrell and his wife, the decedent, established a successful business here in New York, and through their joint efforts the money of this estate was accumulated. The first Mrs. Tyrrell appears to have been unheard of for thirty years, until she and her son appeared in New York. Thereupon Dr. Tyrrell made a financial settlement upon her and upon her son. The first wife claims that she was deserted by the doctor in the year 1884. Neither the first wife nor the son are parties here, nor are they claimants of this estate, but the two brothers of the decedent, one of whom is the petitioner, attacked the validity of Dr. Tyrrell's marriage to their sister. The court cannot find from the evidence that the second marriage took place prior to 1894.

The proofs point strongly to a ceremonial marriage between the decedent and Charles A. Tyrrell, but even if there was none, there is ample proof of a common-law marriage. There is no direct proof that the second marriage was illegal, or that Tyrrell did not procure a divorce from his first wife, or that the marriage was not otherwise legally dissolved. Furthermore, the second marriage may have been *voidable*

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only, and the doctor may have remarried in good faith after his first wife's absence for five years. Dom. Rel. Law, § 7, subd. 5. The burden of proving the invalidity of the second marriage is on the petitioner. *Palmer* v. *Palmer,* 162 N. Y. 130; *Matter of Meehan,* 150 App. Div. 681; *Barker* v. *Barker,* 172 id. 244; *Matter of Salvin,* 106 Misc. Rep. 111; *Price* v. *Tompkins,* 108 id. 263; affd., 179 N. Y. Supp. 946. The facts in this estate are almost identical with the facts in *Matter of Meehan, supra,* and the court there, through Justice Miller, stated the rule applicable as follows: "We think that where the fact of a marriage, especially of a ceremonial marriage, followed by the long cohabitation of the parties and the birth of children, is established, it is incumbent upon whoever assails the validity of the marriage and the legitimacy of the children to prove his case by evidence instead of presumptions, even if that involve proof of a negative, and especially when, as here, the attempt is made after the lapse of thirty years and the death of the parties, not by anyone claiming rights under an alleged prior marriage." 150 App. Div. 681, 684.

The decisions of the courts of Indiana, the original domicile of decedent, are even stronger on the question of requiring complete destructive proof of every essential necessary to controvert the validity of the second marriage. In *Boulden* v. *McIntire,* 119 Ind. 574, cited in *Matter of Meehan, supra,* the court said: "In favor of the validity of a second marriage contracted by a woman while her first husband is alive, it will be presumed that the first marriage was legally dissolved by a divorce before the second was entered into, and one who asserts the invalidity of the later marriage must show that there had been no divorce. Where a negative is essential to the existence of a right, the party claiming the right has the burden of proving such negative; hence where one bases his claim to land upon the alleged invalidity of

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a marriage, he must, by proper proof, remove *every* presumption in favor of the legality of the marriage, although to do this he must prove a negative." Under the authorities cited the petitioner was required to rebut completely and satisfactorily this presumption of the validity of the second marriage. Such presumption is strengthened by the uninterrupted cohabitation of the parties to it for a long period of years, the attitude of their friends, relatives and their acquaintances, and the birth of a child. I hold that the evidence before me, and particularly the testimony of the first wife, does not rebut the presumption of the validity of the second marriage. The petitioner has not sustained the burden of proof upon this issue.

The executors of Dr. Tyrrell's estate raise an affirmative defense by their answer that the petitioner has released his interest in the estate by a written receipt, and that there has been an accord and satisfaction of his rights in the estate. This release is in evidence, and reads: "I am perfectly willing to accept the piece of property situated in Sixth street and Logansport, Indiana, * * * together with the sum of $3,000 in cash as the representative share of the estate of my late sister, Emma M. Tyrrell," signed George H. Lynas. The petitioner's claim is that the release was obtained by Dr. Tyrrell by fraud and particularly by his silence as to his previous marriage. I am of the opinion that this court possesses full equitable jurisdiction in this proceeding brought under section 2490, subdivision 6, to set aside and vacate a decree. Otherwise the court would have to stop the proceedings and remit the parties to the Supreme Court in an action to set aside the release. Section 2510, subdivision 2, must be read in conjunction with section 2490, subdivision 6. The former subdivision relates to the exercise of jurisdiction in this court in the "granting of letters of administration." If equity powers may be exercised in granting

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letters, certainly the court possesses like power in vacating a decree granting letters. Further, section 2490, subdivision 11, provides that a surrogate has power to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred. In order to determine whether the petitioner is a party interested and plainly within the statutory authority, this court has jurisdiction "To administer justice in all matters relating to the affairs of decedents, * * * to try and determine all questions, legal and equitable," in a proceeding of this kind. *Matter of Malcomson,* 188 App. Div. 600; *Matter of Spaulding,* 112 Misc. Rep. 317; *Matter of Fox,* 166 App. Div. 718; *Matter of Brady,* 111 Misc. Rep. 492. It appears that under the law existing at the time of the death of Mrs. Tyrrell her husband was entitled to the whole estate, personal and real, under the law of New York and Indiana. All of the personalty was located in New York (the domicile of decedent), and all of the realty was situated in Indiana. In New York, prior to the amendment of section 100 of the Decedent Estate Law, in effect May 3, 1919, the common-law rule would apply. It was unnecessary, therefore, for the two brothers to be cited as next of kin upon the application for letters of administration. They appear to have been made parties, however, and to have signed renunciations in favor of the husband as administrator. The execution of these renunciations is strong proof that all the parties knew that a question existed as to the validity of the marriage, and that the execution of these papers was thought necessary to complete the settlement of the controversy. The settlement made between the husband and the two brothers provided for the payment of a total of $14,000, or about one-half of the estate, to the brothers, and the remaining one-half to the husband. In other words, the distribution under the compromise was made as the Stat-

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ute of Distribution now provides in this state. In consummation of this agreement the doctor paid the petitioner $3,000 in cash and conveyed one parcel of the Indiana real estate of the value of $4,000, thus making a total of $7,000. The remainder of the real estate, valued at $7,000, was to go to the other brother. The brothers testified that they knew nothing of the prior marriage by Dr. Tyrrell at the time this settlement was made by him, and now when his lips are closed by death they seek to set aside the entire settlement on the ground of fraud. The petitioner testifies that he was advised by his attorneys fully as to his rights under the New York and Indiana law, that he had no interest in the estate as a matter of law, and that he understood that the property given to himself and brother was a gratuity or gift on the part of the doctor. The language of the receipt, which he admits he signed, and the circumstances of the settlement controvert this contention, for the receipt refers to the payment *for his share of the estate.* The appearance on the stand of these two brothers was that of hard-headed, mature men of more than ordinary intelligence, and their story that the settlement was a gift is unbelievable. "The burden rests upon the person who asserted the invalidity of the instrument to establish the facts that would vitiate it, and not upon the person who produces the instrument upon which he relies." Page, J., *Pragi* v. *Lehigh Coal & Nav. Co.*, 176 App. Div. 265, 268. The evidence to set aside a settlement under these circumstances must be strong and convincing. *Monroe* v. *Turner,* 114 App. Div. 634, 640. Dr. Tyrrell is dead and his version of the settlement is unobtainable. The testimony of the brothers as to their negotiations is subject to careful scrutiny. *McKeon* v. *VanSlyck,* 223 N. Y. 392; *Ward* v. *N. Y. Life Ins. Co.*, 225 id. 314, 322. In a somewhat similar case (*Geiger* v. *Ryan,* 123 App. Div. 722) the late Justice Gaynor stated that, whether the second

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marriage were valid or no, a claim that it was valid made by the surviving husband was made in good faith, and a release to him made by a child of the first husband in settlement of her mother's estate should not be set aside as founded upon a fraudulent claim.

Upon the facts before me I hold that no fraud has been established in the making of the settlement. On the other hand, it appears that a fair adjustment of the estate and an executed accord and satisfaction was entered into by the petitioner. *Matter of Waters,* 183 App. Div. 840; *Matter of Wagner,* 119 N. Y. 28; *Matter of Pruyn,* 141 id. 544; *Matter of Losee,* 119 App. Div. 107; *Minehan* v. *Hill,* 144 id. 854.

The petitioner has no standing in this court, having released any interest he might have possessed in the estate. Application denied on both the foregoing grounds. Submit order on notice with proper findings and conclusions in accordance with this decision.

Application denied.

Matter of the Estate of ROBERT J. MCKIM, Deceased.

(Surrogate's Court, New York County, January, 1921.)

Wills — construction of — when the gift is to a class it must be confined to the members of the class living at the date when the division is directed to be made — contingent remainders.

PROCEEDING upon the construction of a will.

Stewart & Shearer, for petitioner.

Adam Wiener, for Remsen McKim.

Julius Miller, special guardian.

FOLEY, S. In this accounting proceeding a question of construction arises. Paragraph 4 of testator's will gave the sum of $100,000 in trust to the accounting

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trustee, the income of which was to be paid to certain life beneficiaries, and further provided in part as follows: "* * * A. The interest on one such fourth part or twenty-five thousand dollars ($25,000) unto my son Robert A. McKim for and during his life, and upon his decease the said trust, with respect to such part, shall terminate and the principal of such fourth part shall be equally divided among all my surviving grandchildren *per capita* (not *per stirpes*), share and share alike, absolutely in fee simple. * * *"

The testator died October 20, 1915, leaving him surviving eight grandchildren. The life beneficiary died May 14, 1920. One of the grandchildren, Mary McKim Daingerfield, died October 22, 1918, leaving her surviving two infant children. The other grandchildren survived the life beneficiary. The question is, therefore, whether the deceased grandchild had a vested interest in the principal of the trust fund or whether the fund is payable only to the grandchildren who survived the life tenant. In other words, do the grandchildren who survived testator or those who survived the life beneficiary take? There are no words of present gift. The only words of gift are contained in a direction to divide and pay over at a future time upon the termination of the trust. These remainders are contingent remainders. *Matter of Buechner*, 226 N. Y. 440; *Matter of Crane*, 164 id. 71. The gift was to a class and must be confined to the members of the class living at the date when the division is directed to be made. *Matter of Baer*, 147 N. Y. 348; *Matter of Kimberly*, 150 id. 90. The intention of the testator seems clear. There is no gift over in the event of the death of any of the grandchildren, and the distribution ordered among the class designated is *per capita* and not *per stirpes*. This clearly indicates the testator's intention to include only those grandchildren who survived the life tenant. The three trusts created were for the benefit of his children. They were the

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immediate objects of his bounty, not the ulterior remaindermen. The remainder was given in each instance not to the issue of each life beneficiary, but to all his surviving grandchildren at the termination of each trust.

The general rule is that the word "children" does not include grandchildren or remote descendants unless there is something in the will to show that the word was used in the broader sense. *Matter of Phipard,* 182 App. Div. 357; affd., 223 N. Y. 676. There is no indication in the language of testator's will of an intention to extend the word "grandchildren" used by him to his great-grandchildren or more remote descendants. A stirpital distribution is forbidden by the testator. As stated by Judge Cardozo in *Matter of Buechner, supra,* 443: "This is no case again for subtle distinctions between directions to pay or distribute and words of present gift. * * * Such tests may help to ascertain the membership of a class not otherwise defined. There is no need to resort to them when the testator has defined the membership himself. * * * We need no canon of construction to justify that holding except, indeed, the primary one, to which all others are subordinate, that the intention of the testator is to be sought in all his words, and, when ascertained, is to prevail."

Decreed accordingly.

Matter of the Estate of MARY M. GRINNELL, Deceased.

(Surrogate's Court, New York County, January, 1921.)

Executors and administrators — accounting — specific legacy — when legatee entitled to legacy with accrued income from the time the will takes effect.

PROCEEDING upon the accounting of an executor.

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Stetson, Jennings & Russell, for executor.

James S. Darcy, for William and Harold Landon.

John J. O'Connell, special guardian.

FOLEY, S. William G. Landon and Harold M. Landon are entitled to a one-fourth part of the cash and securities mentioned in the will on deposit in the Guaranty Trust Company with the accrued income thereon. The legacy to them was specific. *Crawford* v. *McCarthy*, 159 N. Y. 514; *Matter of Matthews*, 122 App. Div. 605. The death of one of the life tenants before the testator had no effect on the estate in remainder except to entitle the remaindermen to actual possession of the property as soon as the will took effect. *Campbell* v. *Rawdon*, 18 N. Y. 412, 421; *Utica Trust & Deposit Co.* v. *Thompson*, 87 Misc. Rep. 31. Moreover, regardless of the nature of the legacy, the plain language of the will requires an equal division of income and principal in four shares. The rule, therefore, that general legacies bear interest from a date one year after the granting of letters has no application to this estate. *Matter of Stanfield*, 135 N. Y. 292, 294; *Matter of Parkin*, 190 App. Div. 875, 877. Artificial and technical rules cannot annul the clearly expressed intention of the testatrix. In paragraph 4 of her will she provided that upon the death of the mother of the Landon children it was her intention that "equality should be established between my four children mentioned in this will." Although in her codicil she subsequently revoked the provision for an increased share of the income to Mrs. Landon, this declaration of equality survived and was reiterated in the codicil in her declaration that "it is my intention that all cash and securities mentioned in my will as being on deposit at the Morton Trust Company (the predecessor of the Guaranty Trust Company) shall be divided equally among my children." Mr.

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Surrogate Fowler, in his decision construing the will, has given effect to this declaration of equality. The proposed distribution of income set forth in the account creates inequality and is neither fair nor just. The amount of income due the Landon children will be the proportionate share of the total income earned on the entire fund, which has been averaged at five and eight one-hundredths per cent.

Decreed accordingly.

Matter of the Estate of JAMES B. KISSAM, Deceased.

(Surrogate's Court, New York County, January, 1921.)

Wills — construction of — when remainder must be construed as a contingent gift to a class.

PROCEEDING for the construction of a will.

Phillips & Avery (S. W. Linington, of counsel), for executors and Anne K. Hays.

Stark B. Ferriss, for John C. Knox as executor, etc., and for Cornelia B. Kissam individually and as executrix.

George O. Redington (George O. Redington and Guy Hughes Riegel, of counsel), for Coulthard Kissam et al.

Robert H. Hibbard, for Ellen Mayne Hays.

McLean & Hayward (Edward A. Freshman, of counsel), for Mary C. Holly.

Valentine & Chichester (Edwin F. Valentine, of counsel), for Tate & Hays, as assignees.

FOLEY, S. On this accounting a question of construction of the will arises. The testator died April

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26, 1885, and his will was proved in this court May 22, 1885. Separate trust funds were created for the benefit of the testator's six children. The trust fund created for the testator's daughter, Lucy E. Reynolds, by paragraphs 7 and 10 of the will, is the only one involved in this proceeding. By the first part of paragraph 7 the testator created a life estate for the benefit of his daughter Lucy in a one-sixth part of all the residue and remainder of his estate, with the net income to her during her life. The will then provides: "Upon the death of both my said daughter and her said husband I give, devise and bequeath the said one equal sixth part of the said rest, residue and remainder of my estate, with all accumulations and income, interest and profits thereon, to her children living at the time of the death of my said daughter and her said husband, and to the issue of any deceased child of hers, in equal parts, said issue to take the part to which their parent would have been entitled if living." The 10th paragraph of the will provides as follows: "In case any child of my said daughter, Lucy Ella Reynolds, shall die before attaining the age of twenty-one years leaving issue I give the share of my estate to which such child would have been entitled under this will, if living to attain the age of twenty-one years, to such issue in equal parts, and in case any child of my said daughter, Lucy Ella Reynolds, shall die before attaining the age of twenty-one years, without leaving issue, I give the share of my estate to which such child would have been entitled under this will, if living to attain the age of twenty-one years, to the surviving brothers and sisters (if any) of the one so dying, in equal parts. And in case there shall be no surviving brothers and sisters, then I give the same to my children and the issue of any deceased child of mine in equal parts, the issue of any deceased child of mine to take the share to which his or her parent would have been entitled if living."

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David I. Reynolds, the husband of Lucy E. Reynolds, died March, 1916, before the life tenant, and the provisions of the will in his favor may therefore be disregarded. Lucy E. Reynolds, the life tenant, died January 22, 1920, so that this trust has terminated, and the remainder is now to be distributed. Lucy E. Reynolds had one child, a son, Hoffman Kissam Reynolds. He predeceased her, having died at the age of twenty-nine, intestate, unmarried and without issue. Upon the death of the life tenant there were surviving five groups of grandchildren, the issue of her deceased brothers and sisters. Three different interpretations are claimed:

1. That the gift of the remainder to Hoffman Kissam Reynolds vested in him in his lifetime and passed to his next of kin.

2. That the testator failed to provide for the present situation, and thereby died intestate as to this remainder by reason of the fact that the life tenant died without issue, or that Hoffman Kissam Reynolds died without issue after he became twenty-one years of age. Under this theory the reversion vested in testator's next of kin.

3. The remainder passed *per stirpes* under paragraph 10 to the grandchildren of the testator living at the death of Lucy E. Reynolds, since she died without issue.

The first construction cannot be adopted. The gift of the remainder is to the children of the life tenant or the issue of any deceased child "living at the time of the death of my said daughter." It is, therefore, clearly a gift to a class, with a direction for the distribution to the members surviving Mrs. Reynolds. *Matter of Kimberly*, 150 N. Y. 90; *Matter of King*, 200 id. 189. The remainder interests were, therefore, contingent and not vested. *Matter of Buechner*, 226 N. Y. 440; *Schwartz* v. *Rehfuss*, 129 App. Div. 630; affd., 198 N. Y. 585; *Matter of Baer*, 147 id. 348;

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Goebel v. *Wolf*, 113 id. 405; *Teed* v. *Morton*, 60 id. 502; *Matter of Allen*, 151 id. 243.

Neither can the second interpretation be sustained. The law favors testacy rather than intestacy. The testator is presumed to have intended to dispose of all his property, and an interpretation which results in partial intestacy will not be favored. *Clark* v. *Cammann*, 160 N. Y. 315, 324. "There is one rule of construction which, to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce,— that he did not intend to die intestate when he has gone through the form of making a will." *Matter of Harrison*, 30 Ch. D., 390, 393, 394; Beal's Cardinal Rules of Legal Interpretation, 514; Jarman Wills, (6th ed.) 991. The general scheme of the will shows that he attempted to provide for a complete distribution of his estate.

I therefore hold that the third construction is the proper one; that the remainder must be construed as a contingent gift to a class, and that the grandchildren living at the death of the life tenant constitute the members thereof. The testator definitely and repeatedly fixed this event as the date of determination. Construction must be rendered as of the time of the taking and vesting fixed in the will. *Metropolitan Trust Co.* v. *Krans*, 186 App. Div. 368, 373. The first two clauses of paragraph 10 must be disregarded, as they add nothing to the provisions already made for the issue of a deceased grandchild in paragraph 7. The language in paragraph 10, as to the gift over of the share which the children of Mrs. Reynolds would have been entitled to if they attained the age of twenty-one years, is meaningless, because there is no prior reference to such share. This language must therefore yield to his unambiguous declaration that only issue living at the death of the life tenant were entitled to take. The last clause of paragraph 10

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must be construed to have been intended by the testator to cover the only contingency not comprehended by paragraph 7, that is, the distribution in case the life tenant died without issue. In that contingency the remainder, under the last clause of paragraph 10 was to go to the surviving issue of the brothers and sisters of Mrs. Reynolds. This is the only possible construction that permits of harmonizing all the parts of the will. *Schult* v. *Moll*, 132 N. Y. 122; *Haug* v. *Schumacher*, 166 id. 506; *Cammann* v. *Bailey*, 210 id. 19; *Matter of Einstein*, 113 Misc. Rep. 105; *Kalish* v. *Kalish*, 166 N. Y. 368, 375; *Hadcox* v. *Cody*, 213 id. 570.

The fund therefore should be divided into five equal shares corresponding to the number of the life tenant's brothers and sisters, and distribution among the grandchildren should be made *per stirpes* as directed by the will.

Decreed accordingly.

Matter of the Estate of THERESA O'BRIEN, Deceased.

(Surrogate's Court, New York County, January, 1921.)

Wills — contested probate — verdict of jury, that deceased was of sound mind and of testamentary capacity but that the will was procured by undue influence, set aside — burden of proof as to undue influence does not shift but remains on the party who asserts its existence — the inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference.

PROCEEDING upon the probate of a will.

Francis J. Hogan, for petitioner.

John J. Cunneen, for contestants.

FOLEY, S. Upon the trial of this contest the jury found in answer to specific questions submitted, first,

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that at the time of the execution of the will the deceased was of sound mind and possessed of testamentary capacity, and second, that the will was procured by undue influence. The proponent moves to set aside the verdict on the finding of undue influence. The contestants move to set aside the verdict on the finding of testamentary capacity. The motion of the proponent will be granted on the grounds that the verdict of the jury is inconsistent, is against the evidence and weight of evidence and contrary to law. Mrs. O'Brien at the time of the execution of the will was about eighty years of age. She left as next of kin two sisters and over thirty nephews and nieces. The estate is small and amounts to the sum of $2,600 in cash and securities and a judgment of doubtful value. The will bequeaths $500 to each of two nieces and the residuary estate of approximately $1,600 to her sister, Mrs. Larkin. The other sister, not mentioned, was apparently older than Mrs. O'Brien and the decedent appears to have understood that she was sufficiently provided for. This other sister did not contest the will. The verdict is not sufficiently supported and the contestants have failed to sustain the burden imposed upon them under the authorities. *Matter of Kindberg*, 207 N. Y. 220; *Matter of Ruef*, 180 App. Div. 203; *Smith* v. *Keller*, 205 N. Y. 39; *Matter of Woods*, 189 App. Div. 324; *Matter of Powers*, 176 id. 455; *Matter of Hall*, 193 id. 362; *Matter of Sullivan*, 229 N. Y. 440; *Matter of Brand*, 185 App. Div. 134; *Children's Aid Soc'y* v. *Loveridge*, 70 N. Y. 387, and the recent decision of the Appellate Division, first department, in *Burke* v. *Burke*, 193 App. Div. 801. Undue influence is an affirmative assault upon the validity of a will, and the burden does not shift but remains on the party who asserts its existence. *Matter of Kindberg, supra.* Although the testatrix was of advanced years and in failing health from hardening of the arteries, the evidence shows that

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she possessed a fairly strong mind for a woman of her age; that she lived alone and kept house for herself; that she visited her relatives, traveling comparatively long distances in the city to their residences; that she went to church regularly alone; that she conversed with persons intelligently, and that she was familiar with the property that she intended to distribute. The will was executed on October 29, 1919, about three months before her death. The jury's finding on the question of testamentary capacity is amply justified. The contestants charge that undue influence was exerted by Mrs. Larkin, the sister of the decedent. The testatrix had made a previous will less than a month before the will now offered for probate. Under this her property was bequeathed in equal shares to four nieces. One niece, Mrs. Loftus, under both wills received about the same amount. The earlier will was executed while Mrs. O'Brien was visiting the residence of these nieces, and at the same time she delivered certain registered bonds to one of the nieces for safekeeping. The inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference. *Matter of Ruef, supra.* The measure of what constitutes undue influence is stated by the Court of Appeals in *Smith* v. *Keller*, 205 N. Y. 39, 44, as follows: "The giving of advice and the use of argument and persuasion do not constitute ground for avoiding a will made by a competent testatrix even if the will is made in conformity with the advice so given. A will cannot be avoided because of the influence of another unless it appears that the influence exerted was so potent at the time the will was made as to take away and overcome the power of the testatrix at that time to act freely and upon her own volition. The influence of another to avoid a will must amount to coercion and duress."

The testimony of contestants' principal witness,

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Mrs. Kleber, a neighbor, is overcome by the testimony of Mr. Hogan, a reputable attorney of standing, who drafted the will. He testifies that no person was present in the room at the time of the preparation of the will, although Mrs. Larkin, the residuary legatee, was in another room of the apartment. The testatrix discussed with him the terms of the will, the question of the return of her bonds from Mrs. Meagher, with whom they had been left, and on the same day she signed an affidavit and order to authorize their return through Mr. Hogan. He testified that the testatrix informed him of her desires freely and without coercion. The testimony of Mrs. Kleber is far from satisfactory on this issue. She has a claim against the estate for "board and attendance" for decedent. There is no evidence to establish that undue influence was exercised by Mrs. Larkin upon the testamentary act. She had the right to use any reasonable and legitimate arguments to induce her sister to make a will in a particular way. The effect of the second will was to revoke legacies made to three of the nieces of the testatrix and to provide for her sister and two of her nieces. In giving her sister, with whom she was on affectionate terms, a larger amount of her estate, the will appears to be fair, just and natural. The persons overlooked by her had no special claims upon her bounty. I am not satisfied from the evidence that the sister, a woman of over seventy years of age, was a party to a conspiracy to obtain this will. In the recent decision of the Appellate Division in *Burke* v. *Burke,* 193 App. Div. 801, Mr. Justice Greenbaum quotes from the opinion in *Eckert* v. *Page,* 161 App. Div. 154: "But the court proceeds with great caution in setting aside the probate of a will on the ground of undue influence. It requires that fact to be established by satisfactory evidence, and if it is not, then it never hesitates to set aside the finding of a jury to the contrary."

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Although a serious doubt exists whether, in accordance with the trend of recent decisions, the will should not be admitted to probate forthwith (*Matter of Case,* 214 N. Y. 199, 204; *Matter of Kennedy,* 229 id. 567; *Matter of McGill,* Id. 405; *Matter of Goodhart,* 173 App. Div. 256), I believe justice requires that a new trial be had.

Decreed accordingly.

Matter of the Estate of Mary Carey, Deceased.

(Surrogate's Court, New York County, January, 1921.)

Transfer tax — when previous order fixing tax is not res adjudicata — reversionary interests.

Application to vacate order appointing an appraiser.

Millard F. Johnson, for executrix.

William W. Wingate, for State Comptroller.

Foley, S. Application is made to vacate the order appointing the appraiser on the ground that the estate is not subject to a further transfer tax. The application is denied.

At the time of her death, May 3, 1913, the decedent had a reversionary interest in one-half of the estate of her father, Michael Duff. This reversion then passed to her brother, John Duff, as her heir at law and residuary devisee, and upon his death this interest became vested in possession. *Matter of Duff,* 114 Misc. Rep. 309; *Duff* v. *Rodenkirchen,* 110 id. 575, 583; affd., 193 App. Div. 898. The latter decision is controlling here. In the transfer tax proceedings taken after her death this interest

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was not taxed. It was clearly an asset of her estate not disclosed to the appraiser by the executrix in her petition in those proceedings. It is now possible to fix the value of the transfer because of the death of the brother without issue and without exercising the power of appointment, and further because of the judgment in *Duff* v. *Rodenkirchen, supra,* construing the will. The previous order fixing tax is not *res adjudicata.* Neither the report nor that order mentioned the asset. *Matter of Goldenberg,* 187 App. Div., 692, 695; *Matter of Naylor,* 189 N.Y. 556; *Matter of Ely,* 157 App. Div. 658. In the absence of a specific finding in the appraiser's report it will not be presumed that the value of the remainders was ascertainable nor that his failure to report them as subject to taxation is equivalent to a finding that they were exempt. *Matter of Ely,* 149 N. Y. Supp. 40. Although a copy of the will of Michael Duff was annexed to one of the affidavits in the original proceedings, no disclosure of any reversion or remainder was made, and the will was only supplied to verify the amount due her on her death upon an annuity in a paragraph separate from that creating the life estates and powers.

Application denied.

Matter of the Estate of MAUNSELL B. FIELD, Deceased.

(Surrogate's Court, New York County, February, 1921.)

Wills — contested probate — executors and administrators — settlement agreement — infants — power of special guardian to enter into an agreement — Personal Property Law, § 24 — *Code Civ. Pro.* § 2683.

PROCEEDINGS upon the probate of a will.

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Arthur W. Clement, for Kings County Trust Company.

Frank B. Washburn, special guardian for Margaret J. Brehm, infant.

COHALAN, S. This is an application by the Kings County Trust Company, as the executor designated in a will that is being contested, for the approval by the court of a proposed compromise agreement, and for the authorization of the special guardians for infant parties and the Kings County Trust Company to join in said proposed agreement. The application is entitled in the pending probate proceeding, and the only petitioner is the proponent above named. There is no authority for this court to authorize the petitioner to enter into a settlement agreement. The statute permits an executor to make such an application. Code Civ. Pro., § 2683. A person designated as executor in a will, as well as all other competent adult parties, have full power to compromise their interests in a pending litigation. A special guardian cannot bind an infant in such a compromise agreement unless he secures the sanction of the court. The usual practice in such cases is for the special guardian to sign the agreement subject to approval by the court, and then to apply for such approval. In this application the special guardians have not made such a request. The only applicant is the proponent of the will.

There is a statute (Laws of 1919, chap. 419, Pers. Prop. Law, § 24) which authorizes an order of the surrogate making such a compromise binding on all parties in interest. Under this statute a person designated executor may, during the pendency of a will contest, present a petition as therein provided, but the agreement of compromise must be first signed by all adult parties in interest. Provision is made for

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the appointment of special guardians for infants, lunatics, unknown persons, persons not in being, etc., so that an agreement in writing pursuant to this section may be made valid and binding upon all such interests, if found by the court to be just and reasonable.

As this application does not conform to the practice first alluded to herein, or to the provisions of section 24 of the Personal Property Law, it must be denied, but without prejudice to a renewal by the proper party or parties upon proper papers.

Decreed accordingly.

Matter of the Estate of JAMES SUPPLE, Deceased.

(Surrogate's Court, New York County, April, 1921.)

Transfer tax — money paid pursuant to compromise agreement between distributees and claimant not deductible.

APPLICATION to fix transfer tax.

McCall & O'Connell, for administratrix.

Lafayette B. Gleason, for the State Comptroller.

FOLEY, S. The application to fix transfer tax is granted. The administratrix claims a deduction of $990 paid to the alleged common-law wife of the decedent. The controversy compromised was between the distributees and a claimant to a part of the estate. It was not a claim against decedent or his property. Her status as widow does not appear to have been admitted or adjudicated. The payment to the alleged widow was simply a transfer of the property of the distributees, and did not diminish the amount passing by the death of the decedent. In *Matter of Marks*, 40 Misc. Rep. 507, Surrogate Thomas held that a payment to a contestant in settlement of a probate pro-

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ceeding was not deductible. Surrogate Fowler held similarly in *Matter of Baldwin*, N. Y. L. J., Dec. 11, 1913, and *Matter of Reed*, 98 Misc. Rep. 102. I can see no distinction between compromises in probate proceedings and settlements made by the next of kin in cases of intestacy. The various transfers are to be fixed as of the death of decedent, for the interests of the transferees were acquired at that time. *Matter of Westurn*, 152 N. Y. 93; *Matter of Cook*, 187 id. 253; *Matter of Murray*, 92 Misc. Rep. 100; Chrystie Inheritance Taxation, 637. This item will be disallowed as a deduction, and the tax assessed against the transfers to the three persons named as distributees in the petition.

Decreed accordingly.

Matter of the Estate of Andreas M. Miller, Deceased.*

(Surrogate's Court, New York County, April, 1921.)

Transfer tax — bequest to a city without the state for a free and public hospital not taxable.

Application for reargument of appeal.

Stewart & Shearer (M'Cready Sykes, of counsel), for United States Trust Company of New York, executor, and for city of Duluth, Minn., for motion.

Lafayette B. Gleason (Schuyler C. Carlton, of counsel), for New York State Comptroller, opposed.

Cohalan, S. The application for reargument of the appeal from the order fixing tax in this matter is granted. The bequest to the city of Duluth in trust

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* See 109 Misc. Rep. 267.—[Repr.

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" for the establishment of a free and public hospital " is exempt from the transfer tax, as it appears that the city is empowered by its charter to receive gifts for such purpose. *Matter of Burnham,* 112 Misc. Rep. 560; affd., 196 App. Div. 907. The order appealed from in so far as it provides for imposition of a tax on the bequest to the city of Duluth, is reversed. Submit order on notice modifying taxing order in accordance with this decision.

Order reversed.

Matter of the Estate of SARAH MCGEEHAN, Deceased.

(Surrogate's Court, New York County, April, 1921.)

Wills — construction of — harmonizing of intent and language into a valid disposition of the whole estate — when there is doubt whether to impute legality or illegality to a provision in a will it is the duty of the court to adopt that construction which prevents intestacy and which does not destroy the fundamental scheme of the whole will — although testatrix omitted to mention what she bequeathed and devised to a certain charitable institution it will be held that she intended to give to it the remainder of her estate after certain life estates.

PROCEEDING upon the construction of a will.

William Wadsworth (Joseph Day Lee, of counsel), for petitioner.

Campbell, Flaherty, Turner & Strouse (W. Irving Taylor, of counsel), for trustee.

Lee & Wadsworth (Joseph Day Lee, of counsel), for various heirs.

Alley, Lee & Voorhees (Joseph Day Lee, of counsel), for various heirs.

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Peck & Hancock (Bayard L. Peck, John T. Hancock and Stanley W. Jones, of counsel), for the St. Joseph Home for the Aged; St. Vincent's Hospital; and the Sisters of Charity of St. Vincent de Paul.

Edward H. Daly, for the Roman Catholic Orphan Asylum of the City of New York.

Andrew S. Hammersley, special guardian.

Louis Cuvillier, special guardian.

COHALAN, S. The referee has held that the only valid life estates created by the will and codicils are those for Ellen Gallagher and Bernard Hannigan, that the other life estates are void, that there is no valid remainder in the codicil, and that there is intestacy as to the real estate that is the subject of the void devises. I have decided that the intent of the testatrix and the language of her will and codicils can be harmonized into a valid disposition of her whole estate. Ellen Gallagher gets a life estate in almost all the real estate, and one of the nephews gets a life estate in certain property at the corner of Avenue C and Second street. The questions of construction involve the life estates to three other nephews and a niece and the remainders limited on said life estate. The sister, Ellen Gallagher, and all the nephews and the niece are dead. The nephews and the niece who survived the first life tenant, Ellen Gallagher, have already enjoyed their life estates, for the trustee acted in the belief that they were valid. The real practical question is, who is entitled to the remainder interests? The court is bound to make an effort to sustain the plain intention of the testatrix to give the remainders to charity if it can legally be done, and to decide the further question of which charity or charities are entitled to them.

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Down to the 6th article of the will there can be no doubt that there was a valid life estate to Ellen Gallagher, and, after her death, a legal and valid life estate to each nephew and the niece, with a vested remainder limited on each such life estate to each of the five charities described in article 5.

When the first nephew or niece died, the fee of the portion of the real estate held for the benefit of that nephew or niece would vest as tenant in common absolutely in possession in the charitable institution or corporation described in subdivision 1 of article 5 of the will; upon the death of the next nephew or niece the same result followed as to that individual one-fifth of the real estate, the owner of the fee being described in subdivision 2 of article 5, and so on until the death of the last of the four nephews and niece. So far the language is clear and free from ambiguity, or at least the legal construction of such language appears to be free from doubt. Each one-fifth of the real estate is thus completely disposed of. Life interests with vested remainders in each one-fifth part of the real estate are given. There is no indication of an intention to suspend vesting of all the real estate until the death of all five life beneficiaries.

The provision of the 6th article that directs payment of income by the executors to the institutions during the life of some of the life tenants is the first indication of anything that suggests an intention to illegally suspend the power of alienation. A provision intended to cut down the estates already given should, in my opinion, be expressed in clearer language than that in article 6. The theory that the testatrix intended the executors to act as agents of the institutions in collecting any rents belonging to any undivided fifth of the real estate, that had already vested in possession and enjoyment of an institution by the death of a nephew or niece, is as consistent with the language of the 6th article as the

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contention that the testatrix therein evidenced an intention to withhold from the institutions possession of all the real estate until the death of the last surviving nephew or niece. Furthermore, this provision, if illegal, may be extricated from the rest and be expunged from the will, if thereby the plan of the testatrix may be saved. *Kalish* v. *Kalish*, 166 N. Y. 368. While one of the institutions owned an undivided one-fifth of the real estate as tenant in common, the executors in looking after the property of the life beneficiaries would collect the rent for the owner of the undivided one-fifth. This would be the usual practice, and it is reasonable to assume that this is the situation that the testatrix had in mind in directing the executors to collect all the rents, even after the death of any of the nephews or niece. It is very likely that the provision was inserted merely for convenience of administration. When there is doubt whether to impute legality or illegality to a provision in a will, it is the duty of the court to adopt that construction which prevents intestacy and which does not destroy the fundamental scheme of the whole will.

The same reasoning applies to the further provision of the 6th article authorizing a majority of the nephews and niece to select some suitable person to take charge of the real estate if the executor named "should die or become incapacitated to act as executor before the several institutions above named become wholly vested in the fee of the aforesaid real estate." By the words "wholly vested in the fee" I think the testatrix meant before all the institutions become vested in possession of all the real estate. She evidently knew that if one of the life beneficiaries died, the institution succeeding to the remainder limited on that life estate could not step in at once and take possession of its one-fifth share. A partition would be necessary, and it might be advantageous to the institution to defer a division until the

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termination of all the life estates. Of special significance in this connection is the fact that the Sisters of Charity of St. Vincent de Paul are named as beneficiaries of three of the five remainders, and would not have the last of the three shares until the death of the fourth of the nephews and niece. It is also to be observed that the institutions are given no voice in the selection of a successor trustee. The referee refers to this language as a strong indication of an intention to illegally suspend the power of alienation, but it should be noted that it does not occur in any dispositive part of the will, but only in the paragraph authorizing some one to look after the real estate in the event of the death or incapacity of the executor. If the language above quoted is of doubtful meaning, and it must be conceded that it is ambiguous, it should not be given the effect of invalidating the 4th and 5th articles in which the real estate is completely and validly devised, and thus destroy the entire scheme of the will and cause intestacy.

It seems to me that up to this point the will is valid. If it ended here and there were no codicils, I think there would be little or no difficulty in sustaining its provisions.

In the first codicil the devise of a life estate to Ellen Gallagher is confirmed. To one of the nephews, Bernard Hannigan, is given a life estate (after Ellen Gallagher's death) in the particular property located at the corner of Avenue C and Second street. To this extent the provisions of the will are changed, with the result that one of the four nephews receives a life estate in a particular piece of property instead of a life estate in one-fifth part of that in which Ellen Gallagher had a life interest. The provision for the life estates to the other three nephews and the niece is to be read in connection with the similar disposition in the will. In fact the codicil expressly states that it is to be taken as a part of the will. Read in

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this way, and in the light of the language there used, it appears that the words "after their deaths" is to be taken as meaning "after their respective deaths." There is no direction such as "upon the death of the survivor," which would clearly show an intention to suspend the power of alienation of all the real estate until the death of the last surviving nephew or niece. The use of the word "deaths" is significant to show that what was intended was the death of each nephew or niece as the condition upon which absolute ownership in the portion held for such nephew or niece depended. Applying the familiar rule that a testator's intention is not to be gathered from a detached portion of the will alone, but from the whole will taken together (*Matter of Title Guarantee & Trust Co.*, 195 N. Y. 339, 344) there is little doubt in my mind what the testatrix meant when we read the detailed provisions of the will, as modified by this brief part of the codicil. She evidently meant that upon the death of each nephew or niece, the part of the real estate limited on that particular life vested absolutely in possession of the remainderman. She intended to follow the same general scheme outlined with more particularity in the will.

In deciding who is entitled to the remainder interests another serious question arises. Under the will there were five distinct and separate remainders, limited on the life of each of four nephews and a niece. By giving, in the codicil, a life estate in a specified piece of real property to the nephew Bernard, the testatrix evidently realized the impracticability resulting from said change if she permitted the part of the will bequeathing the five separate remainders to stand. In the will St. Joseph's Home, in charge of the Sisters of Charity, was given two of the remainders. St. Vincent's Hospital, in charge of the Sisters of Charity, was devised another, and the other two-fifths were to go to the Roman Catholic

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Orphan Asylum. After providing for the life estates, the codicil provides as follows: "After their deaths, I give, bequeath and devise to the Sisters of Charity of the St. Vincent de Paul, a corporation duly incorporated under and pursuant to the laws of the State of New York for the benefit of the institution under their charge, known as St. Joseph's Home for Aged Females, in Fifteenth street, in the City of New York." The testatrix omitted to mention what she bequeathed and devised to the Sisters of Charity of St. Vincent de Paul. The referee decided that nothing passed under this clause on the authority of *Dreyer* v. *Reisman,* 202 N. Y. 476. In that case the will was as follows: "*First.* After all my lawful debts are paid, all funeral and testamentary expenses, I give, devise and bequeath unto my living son and daughters, Charles Hasselbrook, Martha Ellen Nordbruch and Senie Meyer, share and share alike, the same to be equal divided between themselves. *Second.* All real estate if any owned by me and the same cannot be sold at a fair market price, then same sall be sold at public oction." The Special Term and Appellate Division held that this constituted a gift of the entire estate. The Court of Appeals reversed, and held that this intent was not sufficiently clear and that nothing passed under the will. In discussing whether the testator intended to make a devise to anyone, the Court of Appeals, by Werner, J., said, at page 481: "That is a question which, in the nature of things, cannot often arise in the precise form in which it is presented here. There are many cases in which the subject or the object of a gift have been imperfectly identified or described, but yet with sufficient certainty to support a gift by implication (*Marsh* v. *Hague,* 1 Edw. Ch. 174; *Matter of Vowers,* 113 N. Y. 569; *Masterson* v. *Townshend,* 123 N. Y. 458). We have found no case, however, to support a gift by implication where, as in this

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instance, there is no mention, description or identification of the subject of the intended gift or devise. 'To uphold a legacy by implication, the inference from the will of the intention must be such as to leave no hesitation in the mind of the court and to permit of no other reasonable inference.' (*Broadhurst* v. *Field*, 135 N. Y. 564–568)." The facts of the case now before the court are distinguishable from the above case. There can be no other reasonable inference but that the testatrix intended to give to the St. Vincent de Paul corporation the remainder after the life estates in the codicil. Reading both will and codicil together her intention seems to be sufficiently clear. She had given life estates in all the real estate and this remainder was all that was left. The provisions of the will giving in five separate parts the same property to the two or three charitable institutions, including three-fifths to institutions under charge of the Sisters of Charity and the position of the clause under consideration as a residuary clause, all point unmistakably to a gift of all the remainders to the Sisters of Charity of St. Vincent de Paul. The theory advanced by the Roman Catholic Orphan Asylum is manifestly impracticable and could be adopted only as a last desperate resort against intestacy.

The will and codicil are valid and are construed accordingly. Exceptions to those portions of the referee's report which held that this court has jurisdiction to construe the will and to the disposition of the issue as the Statute of Limitations are overruled. The other exceptions are sustained as indicated in this memorandum.

Decreed accordingly.

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In the Matter of the Application of the PEOPLE OF THE STATE OF NEW YORK, by William T. Emmet, Superintendent of Insurance, for an Order to Take Possession of the Property and Liquidate the Business of THE EMPIRE STATE SURETY COMPANY.

In the Matter of The Claim of THE UNITED STATES OF AMERICA, Surety Claim No. 122. H. K. LUCE & COMPANY.*

(Supreme Court, New York, December 22, 1920.)

Insurance — guaranty — evidence — liquidation of surety company — a judgment procured in the United States District Court for the Eastern District of Washington is prima facie evidence of damage — Insurance Law, § 63.

CLAIM by the United States government against the superintendent of insurance of the state of New York liquidating the business of a surety company.

Francis G. Caffey, United States Attorney (J. Joseph Lilly, Special Assistant United States Attorney, of counsel), for claimant.

Clarence C. Fowler (Albert Reese, of counsel), for Superintendent of Insurance for the State of New York.

FREDERICK C. TANNER, Referee. This is a claim for $9,772.13 made by the United States government against the superintendent of insurance of the state of New York, liquidating the business of the Empire State Surety Company, a domestic corporation.

On August 15, 1908, the United States entered into a contract with one H. K. Luce and the Standard Building Company for the construction of part of the Sulphur Creek Wasteway, a reclamation project conducted by the Federal government in the state of Washington. The Empire State Surety Company,

*Published by request.—[REPR.

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by its bond dated August 17, 1909, bound itself to the United States of America in the sum of $13,392 for the faithful performance of this contract, and for the payment to all persons supplying labor and materials to Luce and the Standard Building Company.

The work covered by the contract and the bond was commenced and approximately three miles of the excavation of the ditch completed out of the seven miles contemplated, although practically none of the concrete work was undertaken. The project engineer on the job, pursuant to provisions in the contract authorizing a change, altered the specifications and drawings in relation to the width of the channel and the slope of the banks. The work was abandoned by the contractors on the 17th day of June, 1909, under claim that the change was in direct conflict with the terms of the contract and that they were no longer bound thereby.

Thereafter, and pursuant to the terms of the contract, the United States government declared the contract with Luce and the Standard Building Company "suspended," re-advertised and made a contract with one H. W. Hawley for the completion of this work, dated September 10, 1909. The original contract provided for completion January 1, 1910, and the time of completion in the said Hawley contract was extended to April 1, 1910. Hawley proceeded with his contract and received numerous payments thereunder, but finally likewise abandoned the work, after which the United States government stepped in and completed it on the 15th day of November, 1910.

This claim is to recover the excess cost of completion. The first contract, which we may for the sake of convenience refer to as the Luce contract, provided for an approximate total compensation of $66,960, based on an estimated number of cubic yards of excavation, concrete, back filling, etc., at various prices

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per unit. The Hawley contract made similar provisions, but generally speaking, the number of cubic yards was changed owing to the status of the work when the Hawley contract was made and the unit price was, in most instances, in excess of the Luce contract. The Government completed the work at actual cost, plus overhead and maintenance.

On November 2, 1911, a suit on the bond, and the contract made by Luce and the Standard Building Company was instituted in the United States District Court for the Eastern District of the State of Washington, which was the district in which the work was located. The claimant maintains that the Empire State Surety Company appeared in that action by attorney and interposed its answer as did the contractors, Luce and the Standard Building Company, issue having been joined before December 16, 1912, which was the date of the order entered in the Supreme Court of the state of New York, directing the liquidation of the Empire State Surety Company.

On February 26, 1913, judgment was entered in the United States District Court for the Eastern District of Washington in favor of the United States and against the contractors in the sum of $10,544.13, the amount of the claim in the complaint being for $9,772.13, the difference representing interest and costs.

Subsequent to this judgment and on the 23d day of September, 1913, an order was entered in the Supreme Court of the state of New York dissolving the Empire State Surety Company. On December 6, 1916, the claim of the United States for $9,772.13, which had been filed on February 24, 1913, was disallowed by the superintendent of insurance. Objections to the disallowance were interposed by the United States and the claim was referred to the referee on the 26th day of January, 1917. A great amount of testimony was introduced by the claimant

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and the exhibits in the case are voluminous. It was not submitted to the referee on the part of the claimant until the 13th day of December, 1920, and under somewhat peculiar circumstances. Because of the nature of the claims under this contract and the great lapse of time between the accrual of the claim and the hearings to enforce the same, I allowed the claimant the widest latitude in proving its case. The witnesses have become widely scattered and were brought from a great distance and at considerable expense. At the conclusion of the claimant's case, in order to pass upon questions of law which might determine the case and thus save further litigation, at the request of the superintendent of insurance I directed that briefs be filed and I announced that if I reached the conclusion that the plaintiff had made out a *prima facie* case, the liquidator would be allowed an opportunity either to rebut testimony adduced or to prove his affirmative defenses. This procedure was adopted in this particular case to avoid unnecessary expense to the estate of the surety company in case the claimant had failed to make out a case and thus preserve the amount available for dividends upon claims duly allowed.

Claimant relies upon three separate and distinct lines of proof to establish its damage:

First. The judgment of the United States District Court.

Second. The certificate of its chief engineer as to the costs of the contract and the consequent damage, and

Third. Common-law proof through its project engineer and the storekeeper in the state of Washington as to the items of damage.

I will first consider the last named line of proof.

The common-law proof consisted of the testimony of the engineer on the job, Ernest McCullough, who testified at great length, and of Anton H. Gullickson,

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who was the chief clerk of the Yakima project, who had charge, under the supervising engineer, of the office at North Yakima and the store house at Sunnyside. It appeared that the witness McCullough had also charge of much other reclamation work, of which the portion covered by the Luce contract was a small part, and at times was away from the scene of the Luce contract for several days to a week at the time. Mr. Gullickson's duties also covered a much broader field than the territory affected by the contract at bar, and it became apparent to me that much of their testimony was hearsay. On that part of the work done by the government after the withdrawal of Luce, the Standard Building Company, and later Hawlep, the claimant sought to introduce the books of the various time-keepers. The time-keepers themselves were not produced, although several of them are still in the government service, and requirements of the law of evidence in such matters were not satisfactorily met, and these books were excluded. I was further constrained to strike out much of the testimony of the witness McCullough on the ground that it was manifestly hearsay. It must be borne in mind that the contract did not give to this project engineer the power to make a statement as to the cost of completion which would be binding on both parties, and with that portion of the evidence I have alluded to stricken out, the general condition of the common-law evidence was so unsatisfactory as to the amount of the damage, if any, that an award based upon such evidence alone would be little more than speculation.

The next point to be considered is whether the judgment recovered in the United States District Court for the Eastern District of Washington is competent to sustain the claimant's cause of action. Counsel for the superintendent of insurance in a very able brief attacks this as of no binding force and

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effect against the estate of the insolvent surety for the reason that it was secured on February 26, 1913, after the order liquidating the Empire State Surety Company was entered (December 16, 1912). In the latter order, the creditors of the surety company were restrained from bringing "any action at law or suit in equity or special proceedings against the said corporation." The defendant contends that the claimant, by proceeding in violation of this injunction order, rendered the judgment it procured null and void, and that at best the judgment was against a corporation that had been "dissolved," and the receiver not having been made a party, no effect can be given thereto.

There is no contention here that the injunction order was served on the plaintiff and in fact the judgment was entered only two days after the claim was filed with the superintendent of insurance and only a little over two months after the order of liquidation had been entered. Counsel has cited *Matter of Empire State Surety Company*, 164 App. Div. 586, to show that our Supreme Court has enforced this injunction order in the present liquidation and has fixed a fine of $250 in contempt proceedings against a claimant, The Richmond Radiator Company, who instituted a certain proceeding in the United States District Court for the Western District of Virginia on the 27th day of December, 1913. In that case it affirmatively appears that the proceeding was commenced by the claimant not only after the order of liquidation of December 16, 1912, which had been duly served upon it, but after the final order of dissolution, which was entered on September 23, 1913. This brought it squarely within the terms of the order which prohibited the "commencement" of an action. It does not seem to me that the injunction, which was very broad in its terms and related to future actions of proceedings, should be further

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extended to the prosecution of actions which were commenced long before the order of liquidation was entered. To do so would be to ignore the decision in *Matter of Empire State Surety Co.*, 216 N. Y. 273, in which the following questions which had been certified by the Appellate Division, first department, were answered in the affirmative:

"1. Did the procurement of judgments against the Empire State Surety Company in the United States District Court after the date of the liquidation, to wit: December 16, 1912, in actions regularly begun before that date, entitle the claimants recovering such judgments to share in the assets of said surety company in the hands of the superintendent of insurance as liquidator? * * *.

"5. In a case wherein an action had been begun against the Empire State Surety Company in the United States District Court before the liquidation of said surety, to wit, December 16, 1912, but no final judgment had been recovered prior to the date of the order herein appealed from, will conforming to the provisions of the statute under which the bonds were issued, and hereafter obtaining judgment against said surety company upon their claims, entitle the claimants to share in the distribution of the assets in the hands of the superintendent of insurance as liquidator?"

This decision of the Court of Appeals was made in November, 1915, and the certified questions above quoted were contained in the order of the Appellate Division dated June 25, 1915. This decision was made in this same proceeding to liquidate this insolvent surety, the Empire State Surety Company, and a further reading of the opinion shows that the court draws the distinction between the actions which had been commenced before December 16, 1912, and those commenced after that date. See page 280 of the opinion.

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The counsel for the liquidator cited in his reply brief my opinion in *Matter of Clow & Company,* Surety Claim No. 127A, in this same liquidation proceeding, as an authority against allowing the judgment of the United States District Court of the Eastern District of Washington, in the instant case. What was decided in substance in the *Clow* case was that a claimant who had furnished labor or material must conform to the provisions of the statute. Act of February 24, 1905, chap. 778; 33 U. S. Stat. at Large, 811. This statute provides that the United States of America should have the exclusive right for six months after the completion and settlement of the contract in which to bring an action against the bondsmen and that thereafter persons supplying the contractor with labor or materials should apply to the proper federal authorities to bring suit in the name of the United States in the Circuit Court of the United States in the district in which said contract was to be performed, that only one action should be so brought by a creditor, that he should bring in by publication all other parties who might have claims and that the rights of all parties should be thereupon determined.

The liquidator, however, overlooks the distinction between the United States, who had a direct right to bring suit upon the bond, and the purely statutory right which a material man had and which has been pointed out in *People* v. *Metropolitan Surety Co.,* 211 N. Y. 107, a case arising under provisions of the statute above cited, to which strict compliance must be made.

The facts in the instant case, therefore, take it without the principles enunciated in the *Clow* case, and authorities therein cited, and bring it within the decision in *Empire State Surety Company,* 216 N. Y. 273, for we find the claimant pursuing the exact course there outlined, of having brought suit in the United

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States District Court before the order of liquidation and reducing it to judgment after said date. It seems to me that the learned counsel for the liquidator has failed to grasp the distinction between an order of liquidation and an order of dissolution. It is not contended that a judgment can be recovered against a corporation after its dissolution, without making the receiver or similar officer a party thereto, any more than a judgment can be recovered against a dead man, without bringing his representatives into court.

Section 63 of the Insurance Law, under which these proceedings are being conducted, in paragraph 3 thereof, provides for the entry of an order of liquidation and that thereafter (par. 10): "* * * the superintendent of insurance may apply for the dissolution of such corporation."

This distinction is made plain by Mr. Justice Scott in *City of New York* v. *Illinois Surety Company*, 180 App. Div. 513, 514, where he says: "It is sought to sustain the judgment appealed from by the authority of *People* v. *Metropolitan Surety Company* (205 N. Y. 136). That case, however, is not applicable. There the corporation had been dissolved. Here there is no allegation or proof of dissolution, merely that what is sometimes called a chancery receiver had been appointed. So far as appears the corporation remains alive."

Section 63 of the Insurance Law has been directly construed in *Hartigan* v. *Casualty Company*, 180 App. Div. 193. In that case plaintiffs recovered a judgment against the defendant casualty company which was affirmed by the Appellate Division, third department. The defendant having become insolvent, an order was granted pursuant to section 63 of the Insurance Law, liquidating its business. The superintendent of insurance took an appeal to the Court of Appeals and the respondent returned the notice of appeal on the ground that it was erroneously taken

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in the name of the defendant instead of in the name of the superintendent of insurance, and in discussing the meaning of section 63 of the Insurance Law, the Appellate Division said, in granting the motion to require the respondents to accept such notice of appeal, as follows: "The statute is one of enlargement rather than one of restriction. It was not designed to curtail or limit the powers or rights of the Superintendent in the duties imposed upon him in his official capacity. The provision in the order above quoted does not have reference to court procedure in pending litigation, but to the title to the property and assets of the corporation and the management thereof. The direction to the Superintendent to deal in his own name is specifically limited to the 'property, contracts and rights of action' of the corporation. 'It has been said that a right of action at law arises from the existence of a primary right in the plaintiff, and an invasion of that right by some delict on the part of the defendant' (1 Ruling Case Law, 313). It is only by a strained construction that a judgment against a corporation can be considered as included within the expression 'property, contracts and rights of action' of such corporation. The judgment which the appellant is seeking to reverse is properly not of the appellant but of the respondents. And certainly it is against the policy of the courts to strain unduly the meaning of words for the purpose of defeating a right of appeal on a question of practice. Section 63 of the Insurance Law authorizes the court in its discretion to make such a provision as would require this appeal to be taken by the Superintendent of Insurance in his own name. But the order in this instance granted on application of the Superintendent most clearly did not have in view any such limitation on the method of appeal as is sought to be given in this case. The Superintendent of Insurance in procuring that order did not

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intend nor did the court in granting it intend to interpose obstacles in the performance of his duties in taking such measures as he deemed wise for the best interests of the corporation."

It may be, as was intimated upon the hearing before me, that the liquidator may be able to successfully attack this judgment, as for instance on the ground that the court had not acquired jurisdiction of the Empire State Surety Company, and opportunity will be afforded to the liquidator for that purpose, but I do not agree with his contention that all actions or proceedings against the estate of the insolvent corporation automatically ceased upon the entry of the order of liquidation, or that the only tribunal in which claims against the insolvent company could be determined would be the tribunal of the liquidator's choosing, notwithstanding the fact that actions have been duly commenced in other jurisdictions prior to the order appointing him. I therefore conclude that the judgment in this case is *prima facie* evidence of the right of the claimant to recover the amount of its claim, which was specifically mentioned in the judgment.

As to the third point, whether the certificate of Davis, the chief engineer, was competent proof under the terms of the contract, of the excess cost of completion, counsel for the liquidator stated on the hearing before me that he intended to make an attack upon the same. Doubtless this could be done in any case for obvious mistake, or for fraud, and as the hearing will be continued in any event upon the question of validity of the judgment upon which claimant relies, it would serve no useful purpose to pass upon the certificate at the present time with only a part of the evidence before me. A reasonable opportunity will be afforded the liquidator to rebut plaintiff's evidence and to establish his defense.

I will set down this matter for further hearing at my office at 2 P. M. on December 29, 1920.

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FREDERICK C. TANNER, Referee. On December 22, 1920, I handed down an opinion denying the liquidator's motion to dismiss at the close of the claimant's case, and affording him a reasonable opportunity to rebut the claimant's evidence and to establish his defenses. I there held that a judgment procured in the United States District Court for the Eastern District of Washington was *prima facie* evidence of damage, but that the liquidator would be afforded an opportunity to attack this judgment on proper grounds, and the matter was set down for further hearing on December 29, 1920.

Before the date of the adjourned hearing the superintendent of insurance indicated that he had further authorities to submit and asked for a reargument and an opportunity to file an additional memorandum. Oral argument was had on February 15, 1921. As indicated in the prior opinion, the referee allowed the widest latitude in the method of trial of this claim, for owing to the fact that it arose out of transactions dating many years back and occurring in a remote part of the country, the expenses of the litigation threatened to make serious inroads upon the assets of the estate, as well as to cause unwarranted expense to the claimant which might be avoided in part by the method pursued by the referee.

I see no reason, however, to change my opinion that this judgment constituted *prima facie* evidence of the amount of the claim, and that the liquidator, if so advised, should proceed with his defense.

The liquidator urges two principal points against the judgment procured:

First. That the judgment was not binding for the reason that the provisions of the act of February 24, 1905, were not strictly complied with, and

Second. That the judgment which was dated February 26, 1913, was invalid because it was rendered after the date of the order of liquidation, December

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16, 1912, and because the superintendent of insurance was not made a party to this action.

If further argument were required to dispose of the first objection, it is found in the following authorities, which construe the above act with reference to the distinction between the steps necessary to be taken by the United States, as a party litigant having a direct interest, and the steps necessary to be taken by a person furnishing labor or material. *United States* v. *McGee*, 171 Fed. Repr. 209; *United States* v. *Marshall*, 225 id. 687; affd., Id. 760.

In *United States* v. *McGee, supra*, the court says: "* * * but the statute does not admit of the construction that the provision in the latter part of the sanction respecting the giving of a notice to all known creditors has any reference whatever to the obligation of the United States before it could prosecute its action to final judgment. Said provision has reference only to the duty imposed upon any creditor or creditors who bring an independent action after the failure of the government within six months to sue. This is palpably so for the reason that the pro rata apportionment, where the amount of the bond may be less than the sum of the creditors' claims, applies only to the creditors; and therefore, before any such creditor could take judgment on the bond for his claim, he is required to bring in, by the prescribed notice, the other creditors who are authorized to intervene in such creditor suit, so that the court could ascertain and determine the pro rata distribution of the fund among them. * * *

"It is to be kept in mind that the statute in question as its title expresses, was solely for the protection of persons furnishing materials and labor for the construction of public works, prescribing and regulating their right of action and mode of procedure. It does not purport to give the right of action or to regulate the procedure of the government on the contractor's

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bond. The government is left to proceed in the ordinary way by suit on the bond for its indemnity, just as the government did proceed in this case. The statute only gives to the materialmen and laborers the right to intervene in such suit after it is brought. It does not impose upon the government the duty of giving notice of any kind to such assumed creditors, advising them of such right to intervene. This for the reason that the penalty of the bond stands primarily for the protection of the government, and then for distribution among the creditors of any remaining part of the penalty after the satisfaction of the government's demand."

In *United States* v. *Marshall*, Judge Learned Hand says: "Now, it is scarcely likely that Congress meant so to limit the right of the United States to sue for its own benefit upon its own bond. Such a suit did not require any act of Congress; it arose at common law and Congress would hardly have intended to subject the United States to the duty, as a condition precedent, of bringing in all creditors. Besides, the very words of the proviso are limited to suits 'instituted under this act,' and if, as I have suggested, this suit lay at common law on the bond, these words are not applicable. Some clearer intention than this should be found to limit the rights of the sovereign."

The second objection of the liquidator is based on the course of reasoning adopted in a decision by Judge Jurey handed down on December 20, 1917, in the Superior Court of the state of Washington in an action brought by Charles Sumner Best against the Casualty Company of America. In that action a motion was granted to quash the service of the summons and complaint upon the insurance commissioner of the state of Washington, who was authorized to accept service within the state under a law permitting the defendant casualty company to do business there. The casualty company was a New York corporation that had gone

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into liquidation under section 63 of the Insurance Law of the state of New York, pursuant to an order similar to the liquidation order in the case at bar. It appears from a memorandum decision in the *Best* case that the liquidation order had been entered *prior* to the commencement of the action, and the court held that the New York law providing for such a dissolution of the corporation was a part of the charter of the corporation and followed it wherever it went, and that all who dealt with such corporation consented to be bound by such method of dissolution.

The facts are radically different in the situation at bar. Here the action was commended on November 2, 1911, more than thirteen months prior to the date of the liquidation order, entered December 16, 1912. It is true that the trial of the action was after the date of the liquidation, but the transcript of the proceedings in the United States District Court for the Eastern District of Washington (Claimant's Exhibit 2) affirmatively shows that the Empire State Surety Company appeared by counsel who took part in the trial, which resulted in judgment for the United States of America. The exhibit before me contains the formal recital on page 1: "The above-entitled case came on to be heard before the Hon. Frank W. Rudkin, J., on the 26th day of February, 1913, plaintiff appearing by its attorney, Ralph B. Williamson, Esq., the defendant, H. K. Luce, appearing by himself, and the defendant Empire State Surety Company appearing by *H. K. Luce, Esq., and Mr. Mafe, Esq.*"

There were also offered in evidence certain papers from the file of the state superintendent of insurance relating to this matter. Claimant's Exhibit No. 3 is a carbon copy of a letter from the special deputy superintendent of insurance to John P. Hartman, of Seattle, Wash., stating that, "We are in receipt of notice of trial in the above entitled action for February 25th, at the Federal Building, North Yakima,

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Wash.," and further asking Mr. Hartman to "Take such steps as are necessary to protect the Company's rights * * * in this matter and am entirely relying upon your judgment."

Claimant's Exhibit 4 is the notice of trial referred to, and claimant's exhibit 5 is the letter from Mr. Hartman to Mr. Dunham, the special deputy superintendent of insurance, acknowledging receipt of claimant's exhibit 3, and stating, "I have not arranged to try these cases, but will let it be done by Yakima counsel. I will not break the plans I have made, but I will send the best man I have in the office to assist in this trial. * * *"

On June 3, 1913, Mr. Hartman further wrote Mr. Dunham, special deputy of insurance (claimant's exhibit 6), "This case has been tried at last and judgment rendered for the full amount of the claim of the Government. Under the decision of the Circuit Court of Claims, I do not think there is any hope of reversal."

On June 10, 1913, the special deputy superintendant of insurance wrote Mr. Hartman a letter, of which claimant's exhibit 7 purports to be a carbon copy. It reads, "This acknowledges your letter of June 3, wherein you report the adverse decision in the trial of this action. My judgment seems to concur with yours that no further effort should be made to resist the claim."

Section 63 of the Insurance Law of the state of New York reads in part as follows: "3. If, on a like application and order to show cause, and after a full hearing, the court shall order the liquidation of the business of such corporation, such liquidation shall be made by and under the direction of such superintendent, and his successors in office, who may deal with the property and business of such corporation in their own names as superintendents, or in the name of the corporation, as the court may direct.

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The learned counsel for the superintendent of insurance, both in his briefs and in the argument before me on February 15, 1920, contended that the government of the United States was guilty of an act, which if committed by a private litigant would amount to a contempt of the order of liquidation, and rendered the judgment a nullity. It does not appear that the government had ever been served with such an order, but even if I were to follow the reasoning adopted by the court in the *Best* case, that all persons dealing with the surety company had constructive knowledge of section 63 of the Insurance Law and of all orders that were made thereunder, this contention would be offset by the act of the special deputy superintendent of insurance in contesting this action in the state of Washington in the name of the Empire State Surety Company.

The Insurance Law, section 63, subdiv. 6, provides: "For the purposes of this section, the superintendent shall have power to appoint, under his hand and official seal, one or more special deputy superintendents of insurance, as his agent or agents, and to employ such counsel, clerks and assistants as may by him be deemed necessary, and give each of such persons such powers to assist him as he may consider wise."

That the present superintendent of insurance is bound by the acts of his predecessors is elementary, and in view of the section of the law quoted, the acts of the deputy superintendent are *prima facie* binding upon this liquidator.

The additional point is raised by counsel for the superintendent of insurance that the evidence now before the referee shows that the engineer's certificate on which judgment of the District Court of Washington is largely based, cannot be relied upon, and that, therefore, the judgment must fail.

The state of evidence before Judge Rudkin in that case was different from that before the referee. Even if the evidence in the two claims were substantially

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identical, I am not aware of any authority for the proposition that a referee can sit as a court of appeal and in effect reverse a judgment of a District Court, either on the ground of error in admitting evidence, or because of the insufficiency thereof, or because the referee might have reached a different conclusion. There may be reasons for attacking a judgment collaterally, as I have indicated in my previous opinion, *i. e.*, on the ground of lack of jurisdiction.

As heretofore indicated, opportunity will be offered the liquidator to rebut the evidence of the claimant herein and to proceed with his defenses. I will set the matter down for further hearing the 3d day of March, 1921.

Matter of the Judicial Settlement of the Account of Proceedings of Louis K. Ungrich, as Executor under the Last Will and Testament of Rosina Rennert, Deceased.*

(Surrogate's Court, New York County, June, 1921.)

Executors and administrators — accounting — when beneficiary not bound by instrument releasing executor from loss by reason of investing trust funds in securities not authorized by law — the burden of proof is upon the fiduciary to establish the perfect fairness, adequacy and equity of the bargain, and if the proof is insufficient to meet this requirement the court must hold the case to be one of constructive fraud — equitable jurisdiction of Surrogate's Court — Code Civ. Pro. §§ 2490, 2510.

Proceeding upon the accounting of an executor.

John H. Bolles, for executor.

Merkel & Merkel, for objecting legatees.

John Godfrey Saxe, Referee. The objecting parties are the three children of George W. Rennert and Rosina Rennert, both deceased. Mrs. Ren-

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nert in her will appointed her husband and her brother, Louis K. Ungrich, to be her executors and trustees, and until Mr. Rennert's death in January, 1917, they administered her estate as executors, and since then Mr. Ungrich has continued the administration as surviving executor. In March, 1912, Mr. Rennert and Mr. Ungrich invested $10,000 belonging to the estate in receiver's certificates of the Thos. McNally Company. This investment was made in good faith, at the suggestion of William T. Horton, an officer of the Corn Exchange Bank, where the executors banked the funds of the estate. The counsel for executor has frankly conceded that it was not an investment authorized by law.

In April, 1917, after Mr. Rennert's death, the three objectors duly executed an instrument indorsed "Agreement and Inventory," whereby they approved all Mr. Ungrich's acts as executor, and released him generally. The counsel for the objectors has offered evidence which he conceives showed both actual and constructive fraud in the execution of this instrument. During the hearings neither counsel suggested that the Surrogate's Court did not have jurisdiction of the controversy; but counsel in their briefs have raised various jurisdictional questions and I should be obliged to determine them in any event, because the order appointing me expressly directs me so to do, and because jurisdiction cannot be conferred by consent. *Matter of Mondshain,* 186 App. Div. 528, 529.

The Surrogates Act of 1914 greatly enlarged the jurisdiction of the Surrogate's Court. Code Civ. Pro., §§ 2490, 2510. In addition to the powers conferred upon the court by special provisions of law it is given jurisdiction "to administer justice in all matters relating to the affairs of decedents and * * * to try and determine all questions, legal or *equitable* * * * as to any and all matters necessary to be determined in order to make a full, *equitable* and com-

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plete disposition of the matter by such order or decree as justice requires" (§ 2510), and, "in the cases and in the manner prescribed by statute," to "direct and control the conduct, and settle the accounts, of executors * * *" (§ 2510, subd. 3); "To enforce * * * the distribution of the estates of decedents; and the payment or delivery, by executors * * * of money or other property in their possession belonging to the estate" (subd. 4), and "to proceed, in all matters subject to the cognizance of his court, according to the course and practice of a court having by the common-law jurisdiction in such matters, except as otherwise prescribed by statute; and to exercise such incidental powers as are necessary to carry into effect the powers expressly conferred." § 2490, subd. 11. The courts in their earlier decisions were influenced by the words contained in section 2510, reading, "in the cases and in the manner prescribed by statute," and were inclined to construe the new section somewhat strictly (*Matter of Holzworth*, 166 App. Div. 150; affd., 215 N. Y. 700; *Matter of Hermann*, 178 App. Div. 182; affd., 222 N. Y. 564; *Matter of Mondshain, supra*), but they more recently have given effect to the broad language used in the new act and have declared: "The language is so comprehensive that * * * it sweeps away all constraints upon the surrogate's jurisdiction and the necessity of multiplying remedies in the distribution and transfer of a decedent's property to whomsoever it belongs or should be delivered. The policy of securing unity of administration of a decedent's estate should result in expedition and thrift, and demands varied and highly informed judicial capacities. The State has empowered surrogates in unmistakable language, and it is not the function of the courts to discover or to fashion reasons for thwarting the manifest policy." *Matter of Coombs*, 185 App. Div. 312, 314; *Matter of Malcomson*, 188 id. 600. This court unquestionably has jurisdiction to settle the

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executor's accounts, and I am clearly of the opinion that the broad terms of the act of 1914 and Mr. Justice Dowling's opinion in *Matter of Malcomson, supra,* fully justify me in proceeding to determine whether or not the objecting parties are bound by the instrument which they signed. See, also, *Matter of Dollard,* 74 Misc. Rep. 312; *Matter of Fox,* 166 App. Div. 718.

The objecting parties urge me to disregard this instrument, *first,* because it runs to Mr. Ungrich "individually and as executor," and does not expressly release him, "a trustee," and, *second,* because, as they contend, it was not executed under the conditions of good faith required of agreements between a fiduciary and beneficiaries.

So far as the form of the release is concerned, the cases of *Dority* v. *Dority,* 40 App. Div. 236, and *Matter of Taggard,* 138 N. Y. 610, affg. 41 N. Y. St. Repr. 796, on opinion of Landon, J., below, are without application. It was as trustees that Mr. Rennert and Mr. Ungrich had the right to make investments, but they assumed throughout to administer the estate as executors; and it is as executor that Mr. Ungrich is now accounting. Under these circumstances the instrument running to him individually and as executor would be as effectual a release and ratification of the illegal investment made by him and the objectors' father as an instrument running to him as trustee.

The objectors' second point raises the question of the binding effect of the agreement and inventory. At the time they executed it they were all of age. The two daughters were married. The son was a bright young man nearly twenty-two years of age, who had kept the books of the estate for six months after his father's death and knew that there had been a default in the McNally certificates. The daughters, before signing, read the annexed memorandum which expressly stated that the McNally certificates were

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"past due, with interest from July, 1913." All three knew that litigation was pending in respect thereto. In this situation the objectors voluntarily executed this instrument and thereby agreed that the assets were accurately set forth in the annexed memorandum; released Mr. Ungrich individually and as surviving executor, and ratified and confirmed his each and every act. In the absence of fraud, such an instrument would fully release Mr. Ungrich as to his breach of trust committed in investing in the McNally certificates and would operate as an acceptance of the McNally certificates. *Blair* v. *Cargill,* 111 App. Div. 853, 858.

I will not analyze the evidence in so far as it relates to actual fraud. The record as a whole speaks for itself. I will merely state the executor impressed me as both honest and truthful and that he did not exhibit before me any of the characteristics of a fiduciary who would permit himself to deceive trustful relatives. I hold flatly that he did not make any false statements and that he did not intentionally withhold material information with any intent to perpetrate a fraud.

I am, however, of the opinion that I must disregard the release. The settled law of this state is that all agreements between a fiduciary and beneficiaries are to be looked upon with suspicion; that when a person standing in a confidential relation received a substantial benefit from beneficiaries the transaction is scrutinized with the extremest vigilance and viewed with the utmost jealousy; that the beneficiaries must have full knowledge of their rights and of all the facts and circumstances of the case, and that the burden of proof is upon the stronger party to show affirmatively that all was fair, open and well understood. The burden is on him of establishing the perfect fairness, adequacy and equity of the bargain, and if no proof be given, or if the proof be insufficient to meet this requirement, the court must hold the case to be one of constructive fraud. *Hatch* v. *Hatch,* 9 Ves.

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292; 2 Perry Trusts (6th ed.) § 851; *Fish* v. *Miller*, Hoffm. Ch. 267, 278; *Nesbit* v. *Lockman*, 34 N. Y. 167, 169-170; *Adair* v. *Brimmer*, 74 id. 539, 554; *Wildey* v. *Robinson*, 85 Hun, 362, 365; *New York Life Ins. & Trust Co.* v. *Kane*, 17 App. Div. 542, 548; *Matter of Long Island Trust Co.*, 92 id. 1; affd., 179 N. Y. 520; *Kissam* v. *Squires*, 102 App. Div. 536, 543; *Matter of MacNeil*, 165 id. 842, 844; *Matter of Brewster*, 92 Misc. Rep. 339, 344; *Harrison* v. *Harrison*, L. R. A., 1916E, 854, note, p. 864.

Even from the executor's standpoint, and upon the undisputed evidence, the bargain in this case was the release of a liability for an illegal investment of $10,000, with accrued interest, in order to obviate the expenses of an accounting which would amount to only a few hundred dollars. The instrument in question was indorsed "Agreement and Inventory." While Mr. Ungrich himself was a layman, his counsel prepared the same. The objectors, while they were told that it was a general release, regarded it as a paper which it was necessary or expedient for them to sign in order to make it easy for the executor to continue the administration of the estate. Mr. Ungrich admitted that he knew that the effect of his nephew and nieces signing this instrument would be to relieve him from his obligation for this McNally investment but he did not say anything to them about the question of his personal liability as executor on account of that investment. "That question did not come up at all." The objectors did not understand that the executor was liable, in all events, for this investment as being an investment inhibited by statute; they merely questioned whether it was a good investment. The executor, in order to sustain this release, was bound to show, either that he did not know his own liability and accordingly that he gave the best information which he had; or, knowing that he was liable, that he informed them as to such liability. He has proved neither. On

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the contrary it affirmatively appears that he knew his liability, but did not disclose it. It is therefore entirely clear that the proofs fall short of showing that all was fair, open and well understood. The question is whether this so-called "agreement and inventory" should be disregarded because of constructive fraud as distinguished from actual fraud, and a decision in favor of the objectors will undoubtedly work great hardship against their uncle, who made the investment, now challenged, as the joint investment of himself and the objectors' own father. This hardship is aggravated by the fact that the objectors do not seek to surcharge their uncle merely for one-half of the investment, but for the full amount thereof, with accrued interest, as, under the authorities they apparently have the right to do. *Wilmerding* v. *McKesson*, 103 N. Y. 329. Considerations involving hardship, however, must give way before authoritative decisions based on questions of policy, defining the duties of a fiduciary in making contracts with beneficiaries. Indeed, the reasoning of these decisions apply with much greater force to a release than to a direct gift. In the latter case the ward knows precisely what he bestows. The bounty is open. In the former the benefit covertly given is unknown and uncertain. *Fish* v. *Miller*, *supra*. So, whatever my convictions as to the question of hardship, I am constrained to disregard the agreement and inventory as vitiated by legal or constructive fraud.

Finally, I am of the opinion that the evidence offered by the executor in the stipulation of April fourth cannot avail him upon this accounting. I shall, however, overrule the objection to it, so that it will constitute a part of the record and be available to the executor, for what it is worth, in reviewing my decision before the surrogate.

The objection is sustained.

Objection sustained.

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ADOPTION.

A deed of trust provided that in case there should be no issue of the beneficiary living at the time of the disposition of the principal of the trust the principal should be paid over to the next of kin of the beneficiary. Held, that the adopted daughter of a deceased brother of the beneficiary was one of the next of kin of the beneficiary under the deed of trust and entitled to her share in the distribution of the fund — The words "next of kin" do not include a widow — Domestic Relations Law, § 114. United States Trust Co. of New York v. Hoyt, 663.

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See **Vendor and Purchaser.**

APPEAL.

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ASSOCIATIONS.

1. *Unincorporated — Actions against — Pleading — Injunctions — When motion for judgment on the pleadings granted — Code Civ. Pro.* § 1919.— In an action brought under section 1919 of the Code of Civil Procedure against the president of an unincorporated association on any cause of action upon which plaintiff may maintain such an action against all the associates, the court must find upon allegations and proof that all the members of the association are liable. Where in such an action brought against one individually and as president of the "Amalgamated Clothing Workers of America" and against others individually and as officers, agents or employees of the organization, the complaint alleges "that all of the defendants herein have combined and conspired and agreed to carry out all of the aforementioned purposes * * * by their acts and conduct," and that they "are wrongfully and unlawfully * * * instigating plaintiff's employees to cease work and * * * have caused a general strike against manufacturers of clothing in the city of New York and * * * are instigating persons to picket plaintiff's factories and coercing * * * and intimidating plaintiff's employees," and a particular allegation of the pleading gives irrefutable evidence that the pleader intended the term "defendants" to apply to the persons actually named as such in the caption, in contra-distinction to the term "all members of the association" and that when the pleader intended to designate the latter class he so expressly denominated them, but there is no allegation that all the members of the defendant association participated in alleged overt acts or purposes of the association, authorized or ratified the same or are chargeable with knowledge thereof, the complaint, considering the allegations thereof as though

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ASSOCIATIONS — Continued.
they were all to be considered as bearing solely upon the right to an injunction, fails to state a cause of action and defendant's motion for judgment on the pleadings will be granted, with leave to plaintiff to plead over, if so advised. Friedman & Co., Inc., v. Amal. Cloth. Workers, 44.

2. *Unincorporated — Ticker service — When no action lies against an association for damages occasioned by its incorrect report of decision of United States Supreme Court on taxable status of stock dividends — Libel.*— While everyone is under moral obligation to say nothing that is not true, the law does not attempt to impose liability for a violation of that duty, unless it constitutes a breach of contract or trust or amounts to a deceit, libel or slander. The relation of an unincorporated association engaged in the business of supplying its subscribers with current news by a ticker service to the public, is the same as that of a publisher of a newspaper, and its duties and obligations are to be measured by the same standard. No action lies against such an association for damages occasioned by its incorrect report of the decision of the United States Supreme Court on the taxable status of stock dividends, by one who, seeing such report in his broker's office, sold stocks at a loss, and his complaint must be dismissed. Jaillet v. Cashman, 383.

BANKS AND BANKING.
1. *"Cable transfer" — Contracts — Plaintiff entitled to judgment for amount paid for cable transfer.*— The term "cable transfer" precludes the idea that an actual transfer of money is contemplated or intended by the parties thereto. The seller of a "cable transfer" is in the position of having sold at an agreed price a credit for a sum of money payable at the place indicated in the written memorandum and the buyer has purchased a credit for such sum available at the place and for the payee named. While money paid for a "cable transfer" becomes the money of the seller, it is still under obligation to the buyer to pay to the payee named in the "cable transfer," the agreed equivalent in foreign exchange of the amount received for such transfer. Where in an action to recover the amount paid to defendant for a "cable transfer" of 7,000 marks to a relative of plaintiff, in Poland, who at all times since the transaction has continued to reside at the address originally furnished to defendant, it appeared that the marks were never delivered although nearly a year and a half had elapsed from the time of the purchase of the "cable transfer" and saving clauses in the agreement on which defendant seeks to escape or limit its liabilities have not the effect claimed for them, plaintiff is entitled to judgment for the full amount demanded. Safian v. Irving National Bank, 387.

2. *Failure to establish credit in foreign country — Exchange — Evidence — Plaintiff entitled to return of money paid for foreign credit with interest.*— Where the defendant bank, upon payment to it by plaintiff's agent of the sum of $750 at the city of New York on May 10, 1916, for remittance to plaintiff at Dresden, Germany, where she then resided, undertook to establish a credit for plaintiff

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BANKS AND BANKING — Continued.
with a bank at Berlin, Germany, within a reasonable time, to the extent of the equivalent in German exchange of that sum when it was paid to defendant, to wit, 3,902.40 German marks, the plaintiff, notwithstanding defendant's failure to perform its undertaking by reason of war conditions, is entitled to a return of the money with interest. On July 22, 1920, the defendant, in the course of a letter to plaintiff's agent, stated that it would be pleased to complete the transaction or to refund the value in dollars at the then rate of exchange, to wit, ninety-one dollars and seventy cents. *Held,* that a judgment for that amount granted in an action brought while plaintiff was a resident of New York city will be modified by increasing the recovery to the full amount claimed, with interest from the date of its receipt by defendant. Pfotenhauer v. Equitable Trust Co., 396.

3. *Money paid for transmission to foreign country — Court without power to grant stay until recognition of a government in Russia — Depositions — Municipal Court of city of New York — Laches.* — A sum of money paid to the defendant bank by plaintiff in 1917, for transmission to his wife in Russia, was never paid to her, and soon after her arrival in this country in 1920, plaintiff demanded a return of the money, which was refused. In a Municipal Court action for money had and received, *held,* that the court was without power to grant a motion for a stay "until three months after the recognition of a government in Russia by the United States of America, and the appointment of and the installation of Ambassadors, Ministers and Consuls, so that a commission may issue to take testimony." Such a stay is too indefinite and uncertain and in effect amounts to a final disposition of the action, and an order granting the motion therefor is appealable and will be reversed and the case set down for trial on a day certain. The action having been begun on December 10, 1920, the defendant in failing to apply for the issuance of a commission to take testimony, until February 3, 1921, the day the case was set for trial, was guilty of laches. Kirsner v. State Bank, 404.

4. *When trust company liable for the misappropriation of funds by an executor, one of its depositors — Executors and administrators.* — Where a trust company, without investigation, permits checks payable to one of the two executors of an estate to be deposited to what was virtually his personal special account, each and every item of which was the property of the estate, the trust company is guilty of such negligence as amounts to practically a participation in the diversion or misappropriation of the funds of said estate, and in an action by the surviving executor, though he was negligent in confining the entire charge of the estate to his coexecutor, the trust company is liable not only for the balance of the account with interest but to account for the entire fund deposited and to have judgment rendered against it for any moneys disbursed and for which it might be liable by reason of its having participated in their diversion. Where a part of the fund so deposited with the trust company was transferred by plaintiff's co-executor to the credit of another estate of which he was trustee by a check drawn by him and deposited in the account of said estate with the same trust

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BANKS AND BANKING — Continued.
company, an amount paid therefrom by him for lawyers' and brokers' fees on the sale of a bond and mortgage belonging to said trust estate, the trust estate is not chargeable therewith in the absence of proof that the estate of the co-executor was released, and the trust company remains liable to plaintiff therefor, with interest. But for the amount of two checks drawn by the co-executor out of the special account and payable to the trust estate that estate is liable. Whiting v. Hudson Trust Co., 425.

BILL OF PARTICULARS.

1. *When will be ordered to be furnished to proponent of a will — Surrogate's Court — Code Civ. Pro.* § 531.— Objection to the factum of the will and allegations of lack of testamentary capacity being practically a general denial of what proponent must prove to establish the will, such denial is not a "claim" under section 531 of the Code of Civil Procedure, and does not warrant an order that contestants furnish a bill of particulars. But where allegations of fraud and undue influence are sufficient to require contestants to furnish the name or names of those charged with exercising fraud or undue influence upon the testator or to state lack of knowledge in that respect, a bill of particulars will be ordered to be furnished to proponent, particularly where he swears that he has endeavored to obtain such information, and the will does not indicate with certainty who would be likely to exercise any fraud or undue influence. Matter of Francis H. Ross, 41.

2. *When motion for, granted — Negligence — Workmen's Compensation Act — Employers' Liability Act.*— While plaintiff, an employee of defendant, was engaged in work, maritime in its nature, he sustained injuries to his person for which he claimed and received compensation under the Workmen's Compensation Act. In an action subsequently brought in a state court for the same injuries plaintiff claimed to be entitled to recover both by an action at common law and under the Employers' Liability Act. *Held,* that in the circumstances plaintiff's motion for a bill of particulars of his alleged contributory negligence pleaded as a defense, will be granted. Maeurer v. Morse Dry Dock & Repair Co., 70.

BRIDGES.

Statutes — Right of city of New York to operate railroad over Williamsburg bridge — Municipal corporations — Railroads — Constitutional law — Greater New York Charter, as amended in 1901, § 595(5) — *Public Service Commissions Law,* § 53 — *Railroad Law,* § 22 — *Laws of* 1916, *chap.* 528 — *Laws of* 1897, *chap.* 663.— The provision of section 595(5) of the Greater New York Charter, as amended in 1901, by which the commissioner of bridges, who still had the management and maintenance of the New York and Brooklyn bridge and control of the operation of the railroad thereon, was given in general terms the management of all other bridges, was followed by an express provision abolishing the Williamsburg bridge commission, and all its powers and duties, one of which was to operate and authorize to be operated a railroad over said bridge, were duly transferred to the commissioner of bridges of the city

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BRIDGES — Continued.
of New York and by a later statute (Laws of 1916, chap. 528) to the commissioner of plants and structures of said city. The legislative act (Laws of 1897, chap. 663) which provided that the trustees of the Brooklyn bridge might continue to maintain and operate the then present railroad thereon did not limit the power already delegated the Williamsburg bridge commission, which in turn is devolved upon the present commissioner of plant and structures, and the city of New York through that official has an existing right to operate a railroad on the Williamsburg bridge. Dilluvio v. City of New York, 73 Misc. Rep. 122, distinguished. The legislature having granted to the city of New York the right to operate a railroad on said bridge and there being no place thereon for the storage of cars it must be held that as a necessary implication to such grant the city may erect a barn underneath the structure of the bridge and by necessary trackage connect the existing bridge tracks with the barn, and if in the course of making such connection it is necessary to cross the tracks of the defendant railroad company now operating over the bridge as licensee only and free to abandon the bridge service at any time, the law allows such crossing over. An application by the city of New York under section 22 of the Railroad Law for the appointment of commissioners to determine the compensation, if any, to be awarded defendant as a condition of constructing a cross over on its tracks, etc., will be granted and the obtaining of a certificate under section 53 of the Public Service Commissions Law is not a necessary prerequisite. The legislature has constitutional power to grant to a municipal corporation the right to operate a railroad on the Williamsburg bridge, which, besides being an aerial highway, has been declared by statute to be a public highway. City of New York v. Brooklyn City R. R. Co., 94.

BROKERS.
Real estate — Valid contract for commissions — When broker not employed in a confidential capacity by two opposing interests. — Where there is nothing in an agreement between a real estate broker and an intending purchaser, as pleaded or testified to, whereby the broker bound himself not to disclose to the seller the fact that he was to receive a commission from the other party, the contract is valid on its face. Defendant agreed to purchase certain real estate at the price asked, only through plaintiff as broker, and that if he did not so purchase or if plaintiff did not receive a commission from the seller, defendant would pay plaintiff such commission. The plaintiff having received no commission from the seller upon a sale made within the purview of the terms of the contract brought an action in which he testified that defendant said to him: "If you bring me some property I like, I will buy it quick through you and you get the commission. Even if I buy the property through other brokers and you don't get the commission from the owner, the other side, I will pay from my own pocket the commission." *Held*, that the contract could not properly be construed as subjecting plaintiff to employment in a confidential capacity by two opposing interests, and a judgment entered upon a dismissal of the complaint at the close of plaintiff's case will be reversed and a new trial granted. Levine v. Susser, 609.

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BUFFALO, CITY OF

City of Buffalo — Charter of 1916, § 264(3)— *Constitutional law — Statutes — Police — Injunctions — Pensions — State Constitution, art. VIII,* § 10 — *Laws of* 1895, *chap.* 137.— The provision of section 264(3) of the 1916 charter of the city of Buffalo, that the common council, in its discretion, may grant a pension to widows of deceased members of the police force, etc., is in violation of section 10 of article 8 of the constitution of the state. Where a member of the police force of the city of Buffalo was retired on a pension in 1897, and died five years later, the plaintiff in an action to enjoin the payment of a pension granted to his widow in 1919, by the trustees of the police pension fund, will be granted the relief prayed for. The widow can have no relief under the statute (Laws of 1895, chap. 137) which confines the granting of such pensions to cases "where death or retirement has occurred prior to the passage of this act." Glasser v. City of Buffalo, 88.

See **Injunctions.**

CANAL LAW.

Canal Law, § 47 — *The word "person" includes municipal corporation — Jurisdiction of Court of Claims.*— The word "person" in section 47 of the Canal Law includes a municipal corporation. A claim under such provision of law made by the village of Seneca Falls for damages alleged to have been suffered by it by reason of the act, fault and negligence of the state, in the construction, maintenance and operation of the improved Cayuga and Seneca canal at Seneca Falls, whereby a large volume of water in a pool created by the state was precipitated in and upon the claimant's sewer system and sewage disposal plant, is properly a subject for adjudication by this court and the state's motion to dismiss will be denied. Village of Seneca Falls v. State of New York, 35.

CARRIERS.

See **Injunctions; Mandamus.**

CERTIORARI.

When writ of, sustained — Statutes — Zoning regulation, city of New York — Board of appeals.— The power to fix zones and create business and residence districts in the city of New York resides wholly in the board of estimate and apportonment except in so far as that body, under the statute (Laws of 1917, chap. 601, amending Laws of 1916, chap. 503, § 242(a)), may have delegated to the board of appeals the right to vary the application of the use district regulation adopted by the board of estimate and apportionment. No zoning regulation adopted by the board of estimate and apportionment may in effect be repealed or set at naught by the action of the board of appeals taken in the guise of a variance. The residential character of the properties on the east side of Madison avenue between Thirty-fifth and Thirty-sixth streets in the city of New York cannot but be appreciably lessened in desirability for residential purposes by the construction of a business building opposite them on the west side, and, the board of estimate and apportionment having placed such properties in a district restricted to residence use, the board of appeals, in granting a permit for the

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CERTIORARI — Continued.
erection of a business building on the west side of said block under a resolution containing certain restrictions as to height, shape and architectural features, exceeds its power and a writ of certiorari to review such determination will be sustained. People ex rel. Sheldon v. Board of Appeals, 449.

See **Taxes.**

CHARTER.

See **Ships and Shipping.**

CIVIL SERVICE.

Civil Service Law (*Laws of* 1919, *chap.* 225), § 22-*b* — *World war veterans* — *When position not abolished* — *Mandamus* — *Statutes.*— In the absence of direct statutory provision to the contrary, a position in the civil service may be abolished only by the same agencies that created it. Technically such a position in the water supply, etc., department of the city of New York, as distinguished from the incumbent or the salary, is not abolished until appropriate action to that effect is taken by the commissioner of water supply, etc., and the board of aldermen. The sole test prescribed by section 22-b of the Civil Service Law (Laws of 1919, chap. 225) for the right of a World war veteran who left his position in the civil service to enter the federal military service, to restoration, is that his former position must exist at the time of his discharge from the army. On August 31, 1918, relator, who since 1911 had been assistant engineer in the department of water supply, etc., of the city of New York, left his position to enter the federal military service from which he was honorably discharged September 30, 1920. Upon the hearing of an application pursuant to section 22-b of the Civil Service Law (Laws of 1919, chap. 225) for a peremptory writ of mandamus to compel the commissioner of water supply, etc., to reinstate him as an assistant engineer, *held*, that where notwithstanding the respondent's contention that the position formerly held by relator had been abolished, it clearly appeared that after the shifting of various engineers of the same general character as relator and after the intradepartmental transfer of "office designations" and "titles," the position of relator as he left it to enter the federal military service was intact upon his return, he came within both the letter and spirit of the statute and was entitled to the writ directing his restoration to his former position. People ex rel. Machen v. Hayes, 373.

CLAIMS.

1. *When court without power to amend* — *Notice of intention* — *Contracts.*—A claim may not be amended by setting up a cause of action of a nature different from that stated in the notice of intention and dependent upon essential facts not contained in such notice. Where the notice of intention filed against the state for work done under a contract neither charges nor imputes to the state, its officers or agents, acts, faults or omissions other than those of negligence, mistake and error, the court is without power to amend the claim so as to set up fraud. Murray v. State of New York, 363.

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CLAIMS — Continued.

2. *Flooding of lands — Cloudburst — When state acquires right by prescription to continue flow of water over lands — Claim dismissed.* Smith v. State of New York, 683.

See **Court of Claims.**

CODE OF CIVIL PROCEDURE.

See **Code Civ. Pro. cited, ante, p. xlvi.**

CODE OF CRIMINAL PROCEDURE.

See **Code Crim. Pro. cited, ante, p. xlvi.**

CONSTITUTIONAL LAW.

Equal protection of the laws not denied by Laws of 1921, *chap.* 154 — *Agreement between the states of New York and New Jersey pursuant to said statute is valid — Injunction denied in action for abrogation of said agreement.*— Subject to the approval of the Congress any two states may enter into a joint adventure to promote the common welfare of their citizens. The statute (Laws of 1921, chap. 154) designed to remove artificial barriers to delay in the shipment of goods existing at the port of New York and to corner special benefit upon the people of the states of New York and New Jersey, as well as the country in general, is not unconstitutional as a denial to the city of New York or its people of the equal protection of the laws, and the contention that said statute creates a new political subdivision is without merit. Where by an agreement entered into between the states of New York and New Jersey pursuant to said statute, they agreed to cooperate, each within its own sovereignty, and the agreement expressly limits the jurisdiction of the joint board of managers to such powers and authority as may be legally conferred upon them in conformity with the constitution of the state of New York and the constitution of the United States, it is obvious that the state of New York has parted with none of its sovereign rights nor relinquished the control over any property belonging to its people. A motion to continue an injunction in an action brought by the city of New York seeking to have said agreement abrogated, denied upon the merits. City of New York v. Willcox, 351.

See **Tables United States Constitution, New York State Constitution cited, ante, pp. xlii, xliii; Buffalo, City of; Landlord and Tenant.**

CONTRACTS.

1. *Sale of real property — Specific performance — Title — Notice — Rescission — Lease — Insurance (fire).*—A contract for the sale of real property under which title was to be closed on or before June 1, 1920, upon a five days' notice from the purchaser, provided that possession was to be delivered to him at the time of the settlement subject to an existing lease which contained a clause that if the building should be rendered untenantable by fire the rent should cease until the building could be put in complete repair. On April 10, 1920, while the seller was still in possession of the premises, the building thereon was substantially damaged by fire. On May 28, 1920, about two weeks after the seller's attorney had written to the

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CONTRACTS — Continued.
attorney of the purchaser that it was not the seller's intention to commence rebuilding until the purchaser had finally indicated his decision to accept the property or rescind the contract, the seller by letter refusing to extend the time of settlement, stated in substance that inasmuch as the purchaser's time limit for giving the notice of his readiness to settle had expired, defendant considered the contract broken by the purchaser. In an action for specific performance with abatement from the purchase price on account of the damage caused by the fire, *held*, that the five days' notice was required only in case the plaintiff availed himself of the implied privilege of closing the title before June first, the law day of the contract, and that defendant's repudiation of the contract by the letter of May twenty-eighth was without legal justification. The premises having been restored by defendant at an expense concededly less than the insurance collected, plaintiff, who is willing to take the premises as they now are, was entitled as of right to a conveyance thereof, upon payment in full of the purchase price. No provision having been made covering the contingency of the loss of rent caused by the fire, the parties in that respect should be left as they are. Boehm v. Platt, 55.

2. *Breach of — When surety not released.*— Where an obligee has been guilty of acts and omissions in the performance of the contract of its obligor, which may be to the prejudice of the surety, the latter is only released to the extent of its actual damage, but this rule is subject to limitations not applicable to the present case. A building contract provided: "In order to assist the contractor to prosecute the work advantageously the engineer shall, from time to time, as the work progresses, but not oftener than once a month, make in writing an estimate — when such estimate shall be approved by the engineer, ninety per cent of the amount stated therein shall be paid by the company to the contractor on or before the 20th day of the month following that for which the estimate is rendered." Weekly payments made during May, June and July for the work actually done and materials furnished to the extent of ninety per cent of the contract, were deducted from the monthly estimate for each of those months at the time when payment on the monthly estimate was rightly made. Between the first and the twentieth of June, July and August, monthly estimates as provided for by the contract were made and the contractor was paid that monthly estimate less the amount of the weekly payment. Similar weekly payments were made during August and though before the estimate for that month was made the contractor had defaulted, it was paid the amount of the estimate for August, less the weekly payments made during that month. *Held*, that it appearing in an action for damages against the contractor and its sureties for faithful performance of the contract the sureties had suffered no actual damage they were not released by the weekly payments made in May, June and July. The contractor having defaulted before the monthly estimate for August had been made, plaintiff never became obligated to make any payment for that month and to the extent that he did make such payment, the sureties cannot be charged. Neither could any payment made to the contractor after his default be charged against the sureties. The deduction, therefore, of all of the pay-

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CONTRACTS — Continued.
ments from plaintiff's conceded damages would make no difference in the result to the sureties because of their limited responsibilities. The bond of each of the sureties was $50,000, and one of them, a corporation in the hands of a foreign receiver, pleaded as a defense that a payment of $30,000 to complete the contract, paid out of retained percentages, which was a security for the surety, was made without its consent. *Held,* that while to the extent of such payment, the surety was discharged, its liability on its bond remained unaffected, even conceding that such payments and said surety's share of the full amount of the weekly payments were not all properly made. The action was rightly brought against said surety, in this state, and judgment may be properly entered against it. New York Mun. R. Corp. v. Int. Const. Corp., 341.

3. *Oral agreement to reconvey real property upheld — Husband and wife — fraudulent conveyances — Statute of Frauds.*—At the time when plaintiff, a truckman, had an accident on a railroad a boy riding with him was killed. In an action against the railroad company on his cause of action plaintiff recovered judgment and in fear of an action against him by the parents of the boy, he gave his wife a deed of conveyance of the premises where the family lived, upon her oral agreement to reconvey the property to him at any time. Thereafter he improved the premises and built a stable, paid all the taxes and insurance, besides paying off a mortgage on the property. Subsequently the wife, having left her husband, who is still in possession, without consultation with him, conveyed the property to a neighbor and received and retained the consideration paid. In an action to compel a reconveyance of the premises and for cancellation of the purchase money bond and mortgage made by the alleged innocent purchaser to plaintiff's wife, she testified that she did not remember the conversation which resulted in her oral agreement to reconvey. *Held,* that the plaintiff's version, upon which the court must rely, clearly upheld the contention of the plaintiff as to the oral agreement to reconvey. The alleged innocent purchaser, who knew both plaintiff and defendant and who was in the court room at the trial but did not take the stand, held not to be a purchaser in good faith, and that plaintiff was entitled to the relief asked for. Tiedemann v. Tiedemann, 462.

4. *Glaziers — Breaking of windows by third persons during progress of work — Stopping payment of check given for work — When an agreement is entire, performance pro tanto as the work progresses need not be accepted.*— Plaintiffs agreed to furnish and set for defendants seven lights of glass in a store front and also to set one light of glass to be furnished by defendant, all for $700. While plaintiffs were engaged in the work and after two lights had been set, they were broken by some persons unconnected with the parties, and apparently because of a strike in the glass trade. The light furnished by defendants, though broken at the same time, was set under instructions from them. Under police protection four of the other lights furnished by plaintiffs were set and the remaining one was not set because of defendants' request After plaintiff had commenced setting the lights and before the two were broken they received a check from defendants for $700. In an action on the

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CONTRACTS — Continued.
check, payment of which had been stopped, *held*, that a dismissal of the complaint upon the theory that plaintiffs had not performed their agreement will be affirmed on the ground that the agreement being entire, performance *pro tanto* as the work progressed could not be accepted. Greenberg v. Mager, 503.

5. *When executory contract may be terminated by injured party — Equitable relief — Motion pictures — Royalties — Accounting.*— Where there has been a breach of an executory contract whether it be in payment of the consideration or otherwise so substantial and fundamental as to strongly tend to the defeat of the essential object of the parties in making the contract, it may be terminated by the injured party. Though the injured party has the right to terminate the contract it does not necessarily follow that a court of equity will decree a cancellation thereof, but where the contract confers upon the other party the privilege to use and enjoy a property right of the injured party, the continued use of which works to its injury, notwithstanding a material breach of the contract, equity may grant relief. Plaintiff, the owner of the copyright of a number of stage plays, granted to defendant C, and his assigns, a license to dramatize, produce and exhibit them in the form of motion pictures by a contract reserving a weekly royalty for the use of each of the several plays wheresoever and by whomsoever exhibited, such contract to continue for a term of eight years from its date and thereafter, as long as the royalties should be paid. Although the films were first available for rental to exhibitors in May, 1914, no royalties were paid after the fifth of the following October, at which time only thirteen-sixteenths of the term of the contract had expired. There was no express repudiation of liability to pay royalties either on the part of C or his assignee upon which he depended to be put in funds and which had so placed itself in the hands of another as to incapacitate itself to collect a part of the earnings to which it was entitled. Plaintiff gave written notice to all parties that it elected to terminate the contract because of default of the payment of royalties and that further exhibition of the films was prohibited, but wholly ignoring such notice the exhibition of the plays was continued. In an action to have the contract terminated and for an injunction and accounting, *held:* that it was to the effect of the breach upon the mutuality of the contract for which the law has regard and that whether plaintiff's failure to receive royalties was due to C's repudiation of the contract, to wilfulness or to impecuniosity was immaterial, and that plaintiff would be granted a decree that will make effective the termination of the contract, which, theoretically, was accomplished by the notice given by plaintiff. One of the functions of equity being to avoid unnecessary litigation and to administer such relief as the nature of the case and the facts, at the end of the litigation, demand, the decree to be entered should carry an accounting by C down to the date of its entry, but on no principle may the other defendant, whose only interest in the plays was subject to the contract with C, be held to account either before or after the notice of termination. De Mille Co. v. Casey, 646.

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CONVERSION.

Automobiles — Hiring — Right of possession.—Where on the trial of an action for the conversion of an automobile it was proved, as alleged in the complaint, that the car at a certain time had been rented to a corporation and under a charge that there was a question of fact as to whether the lease made with the corporation was subsisting when the alleged conversion occurred, and whether plaintiff was entitled to possession of the car at that time, the jury found for the defendant, a motion for a new trial on the minutes because of the trial court's refusal to charge that plaintiff could not recover if the jury found that the corporation did not have the right to the possession of the automobile, will be denied. Schummers v. Martin, 572.

CORPORATIONS.

When stockholders entitled to a reasonable time to subscribe for a proportionate amount of increased capital stock — Pleading — Laches — Damages.— Stockholders, in the absence of laches or acquiescence, have a vested right to take their proportionate share of an increase in the capital stock and are entitled to a reasonable time within which to subscribe therefor. Where in an action for damages, because of defendant's failure to give plaintiff or her testator, who was the holder of certain shares of the capital stock of defendant, a reasonable opportunity to subscribe for a proportionate amount of its increased capital stock, it appears upon the face of a separate defense, in which there are no denials, that no notice whatever of the stockholders' meeting was ever sent to plaintiff's testator, and the facts set forth in lieu thereof and as an excuse for not sending such a notice constitute neither laches nor the waiver of the vested right of plaintiff's testator to take his proportionate share of the new stock, a demurrer to the separate defense will be sustained with costs. Hoyt v. Great American Ins. Co., 1.

COURT OF CLAIMS.

1 *Jurisdiction — notice of intention must be filed within six months of accrual of claim.* Brotherhood Wine Co. v. State of New York, 681.

2. *Jurisdiction — Failure to file notice of intention in time — Claim dismissed — Claims — Code Civ. Pro.* § 264.— A failure to file with the clerk of the Court of Claims and the attorney-general a written notice of intention to file a claim under a contract with the state lunacy commission for building construction relating to a hospital, as required by section 264 of the Code of Civil Procedure, is a jurisdictional defect which precludes a determination of the claim on its merits whether otherwise valid or not. Where, therefore, the claim herein, if it accrued at all, accrued previous to August 19, 1913, the filing of a notice of intention on February 19, 1914, comes too late, and the claim must be dismissed for want of jurisdiction. Henderson v. State of New York, 25.

See **Claims.**

CRIMINAL PROCEDURE.

1. *When accused not entitled to jury trial — Code Crim. Pro.*, § 887, *subd.* 4(*e*).— Upon a charge of having violated section 887, subdivision 4(e) of the Code of Criminal Procedure, the accused is

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CRIMINAL PROCEDURE — Continued.
not entitled to a jury trial as matter of constitutional right. People v. Harding, 298.

2. *Indictment — Uncorroborated testimony of police officers — Accomplices — Indictment dismissed.*—Where an indictment is found solely upon the uncorroborated testimony of police officers, who are to be deemed the accomplices of the defendant in the crimes charged against him, a motion to dismiss the indictment will be granted with leave to resubmit the case to the grand jury. People v. Porter, 301.

3. *Supreme Court may by ex parte order remove for trial an indictment found in another court — Court in which indictment was found has no further jurisdiction in the matter.*— The Supreme Court by an order made *ex parte* may remove to that court for trial an indictment found in the Court of General Sessions of the city and county of New York and an application for a writ of prohibition to restrain further proceedings in the court in which the indictment was found will be granted. If the defendants believe that they are prejudiced by such removal of the indictment, by an order instead of a writ of certiorari, they may move to have the order vacated, but while the order stands the Court of General Sessions has no further jurisdiction in the matter. People ex rel. Swann v. Court of Gen. Sessions, 454.

DAMAGES.
Interest upon award.— An award made pursuant to chapter 612 of the Laws of 1918, which is silent as to interest, carries interest under section 59-a of the Highway Law. Allen v. State of New York, 274.

DISCOVERY.
1. *When cannot be used in Surrogate's Court to collect a debt — When order to attend inquiry will not be granted.*—A discovery proceeding cannot be used in the Surrogate's Court to collect a debt, and where it is apparent that delivery of specific property cannot be directed, an order to attend the inquiry will not be granted. Matter of Herman Appel, 118.

2. *When motion to vacate order for, granted — Wills — Evidence — Code Civ. Pro.* § 2607.— The proceeding under section 2607 of the Code of Civil Procedure was not intended and should not be used merely as a sort of discovery proceeding to ascertain evidence to be used in an action in another court. Decedent died in 1917 and his last will dated March 23, 1914, by which all prior wills by him made were revoked, was duly admitted to probate. *Held*, that a motion to vacate an order made in a proceeding under section 2607 of the Code of Civil Procedure directing an attorney to attend for examination concerning a will of decedent made in 1907 and to produce the document which was alleged to have been made in accordance with a contract which was alleged to have been violated in the execution of the will admitted to probate, will be granted. Matter of Herman Sielcken, 385.

See Executors and Administrators.

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DOWER.
See **Specific Performance; Wills.**

EJECTMENT.
Violation National Prohibition Act — Judgment for plaintiff on the pleadings.— Where upon the conviction of a tenant for a violation of the National Prohibition Act upon the leased premises, the landlord under the option given by the statute terminates the lease, demands possession and gives the tenant notice to quit, a motion by the landlord for judgment on the complaint and demurrer thereto in an action in ejectment will be granted. Farrelly v. Wells, 632.

ENCROACHMENTS.
Action to remove — When title to real property is unmarketable. — The title to real property is unmarketable so long as the front wall of a building erected thereon encroaches two inches upon a city street. Perlman v. Stellwagen, 6.

EQUITY.
See **Contracts.**

EVIDENCE.
What are confidential communications — Letters — Husband and wife — Divorce — Code Civ. Pro. § 831.— Letters between husband and wife are confidential communications and their contents may not be disclosed unless the privilege is waived. A letter from a wife to her husband, which is a confidential communication and within the prohibition of section 831 of the Code of Civil Procedure, may not be considered, over her objection, upon a motion for alimony and counsel fees in the husband's action for a divorce. Matters concerning which plaintiff cannot testify to on the trial, or the hearing upon the merits of a special proceeding, founded upon an allegation of adultery, under section 831 of the Code of Civil Procedure, he will not be permitted to put into his affidavit filed in opposition to a motion for alimony and counsel fees, when defendant objects. Upon such motion it is debatable whether letters alleged to have been written by the correspondent to defendant and received by her and claimed to have been thereafter delivered to plaintiff, should be received upon the plaintiff's affidavit unaccompanied by other affidavits, and when defendant objects, such letters will not be considered by the court. Stillman v. Stillman, 106.
See **Insurance.**

EXECUTORS AND ADMINISTRATORS.
1. *Contested probate — Rights of temporary administrator — When discovery proceedings will not cover personal letters.*—While prior to the issuance of letters the one named in a will as executor may have certain dominion and custody over the property of a decedent, his rights are subordinate to those of the temporary administrator, in the event of a contested probate. Discovery proceedings may not be used for the purpose of seeking evidence to be used in another proceeding. A temporary administrator as an incident of his duty to take into possession the assets of the estate, should, pending a contest of the will, take possession of such documents as

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EXECUTORS AND ADMINISTRATORS — Continued.
bear upon the financial affairs of the deceased, books of account and other similar papers, and in a discovery proceeding an order directing delivery to him of such documents will be granted. Such an order, however, will not be made to cover letters written by the residuary legatee to the deceased; if they constitute material and competent evidence the Code of Civil Procedure provides ample methods for their production for use upon the trial. Matter of Joseph J. Ryan, 472.

2. *Preferred legacy paid in part upon giving bond — Code Civ. Pro.* §§ 2687, 2688. Matter of Wilhelmina Gindler, 695.

3. *Wills — Bequest in lieu of commissions — Transfer tax — When amount of commissions not deductible — Tax Law,* § 226. Matter of Teresa M. O'Donohue, 697.

4. *When letters of administration will not be revoked — Meaning of "incompetency" under Code of Civil Procedure,* § 2564. Matter of Duncan Phyfe, 699.

5. *Ancillary administration — Disapproval of secret stipulations entered into between parties interested in the estate — Report of referee confirmed.* Matter of Edward Ackley, 707.

6. *Accounting — Abatement of legacies — Specific legacy preferred — Interest on trust fund to be set up from sale of lands dates from the time within which sale was directed to be made.* Matter of Henrietta Obst, 711.

7. *Temporary administrator should account before making distribution.* Matter of Marie Hauselt, 713.

8. *Accounting — Specific legacy — When legatee entitled to legacy with accrued income from the time the will takes effect.* Matter of Mary M. Grinnell, 722.

9. *Accounting — When beneficiary not bound by instrument releasing executor from loss by reason of investing trust funds in securities not authorized by law — The burden of proof is upon the fiduciary to establish the perfect fairness, adequacy and equity of the bargain, and if the proof is insufficient to meet this requirement the court must hold the case to be one of constructive fraud — Equitable jurisdiction of Surrogate's Court — Code Civ. Pro.* §§ 2490, 2510. Matter of Louis K. Ungrich, 762.

See **Stockbrokers.**

EXTRADITION.

Rendition warrant — A mere conflict of evidence upon a hearing under a writ of habeas corpus will not warrant the reversal of the determination of the governor. — Where a person held under a rendition warrant issued by the governor of this state upon the requisition of the governor of a sister state sues out a writ of habeas corpus, the issue of fact whether the accused was in the demanding

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EXTRADITION — Continued.
state at the time of the commission of the crime charged against him, is not to be determined according to the ordinary preponderance of evidence, and a reversal of the determination of the governor of this state, regularly arrived at, is not warranted because of a mere conflict of evidence upon that issue. The identity of the prisoner, the fact that the charge of his having deserted his wife was a crime and that the extradition proceedings were regular and legally sufficient, were conceded. The wife of relator testified as to his presence in the demanding state on the particular date laid in the indictment, and the same fact was affirmed in affidavits accompanying the requisition. In addition to his own testimony, to the contrary, relator produced two witnesses, mere casual acquaintances, who testified to relator's continued presence in another state during the week covering the date stated in the indictment. *Held,* that the writ should be dismissed and relator remanded to custody. People ex rel. La Rocque v. Enright, 206.

FORECLOSURE.

1. *Real Estate — Lapse of time insufficient reason for refusing to grant an order to put purchaser in possession — Code Civ. Pro.* § 1675.— Upon an application for an order under section 1675 of the Code of Civil Procedure to compel the sheriff to put the purchaser at a sale in foreclosure in possession, the court should be guided by the facts in each particular case, and mere lapse of time is not sufficient reason for refusing to grant such an order, and if the court deems it is for the best interests of all concerned, the granting of the order is justified. The purchaser at a sale in foreclosure, after retaining title to the property for about five years, though it never had been put into actual possession thereof, conveyed it to the present record owner. Upon the return of an order to show cause obtained by the wife of the mortgagor, who was a party to the foreclosure action, why an order granted pursuant to section 1675 of the Code of Civil Procedure directing the sheriff to put the present owner in possession of the property should not be vacated, it appeared that though after the sale in foreclosure a demand for the actual physical possession of the property had been made by the purchaser upon the mortgagor's wife she never surrendered such possession and that during the time she occupied the premises she made no effort to have her dower right established by legal action and did not notify the purchaser in foreclosure that she had any rights in the property. *Held,* that the order to show cause will be vacated and the present owner's motion to continue in force the order granted pursuant to section 1675 of the Code of Civil Procedure granted, with direction to the sheriff to proceed thereunder. Albany County Savings Bank v. Bartow, 233.

2. *Mortgage to secure lease — When extension of payment of installment of rent will not impair obligation of guarantor.*—Where each installment of rent called for by a lease is a separate and independent demand an extension of the time of payment of one will not impair the obligation of a guarantor as to the others. In an action to foreclose a mortgage given to secure performance of a lease for five years from January 1, 1916, the default alleged was non-payment of the rent for the period commencing October, 1918,

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FORECLOSURE — Continued.
and terminating with the month of April, 1919, the amount thereof being in excess of the principal of the mortgage. *Held,* that a letter from the lessor to the lessee granting a credit for a part of the rent from October 1, 1917, to September 30, 1918, and an extension of the time for the payment of the balance of rent accruing during that year, did not affect the rent accruing after the expiration of that period, even assuming that the letter, relied upon by defendant as a modification of the guaranty contained in the mortgage, was based upon absolute consideration. There being no provision of the lease restricting the assignment thereof and the language of the guaranty for the payment of rent neither contemplating nor creating a trust personal to the promisee, the guaranty was not a special one. Sutter v. Nenninger, 359.

See **Mortgages.**

FRAUD.

Accrual of action — Statute of Limitations — Code Civ. Pro. § 382(5), *as amended in* 1920.— The amendment in 1920 to section 382(5) of the Code of Civil Procedure, which provides that in an action to procure a judgment for fraud the cause of action is not deemed to have accrued until the discovery by plaintiff or the person under whom he claimed, of the facts constituting the cause of action, does not change the limitation of years for actions of that character, but only provides for them the same rule of computation formerly applied to equitable actions founded in fraud, and said section, as thus amended, is retroactive as well as prospective in its operation. In an action brought since the amendment to section 382(5) of the Code of Civil Procedure in 1920, to recover damages for a fraud alleged to have been perpetrated about eight years before, the complaint alleged that the fraud was not discovered by plaintiff until about eight months before the commencement of the action. The six-year Statute of Limitations applicable to the cause of action pleaded had expired about two years before the action was commenced. *Held,* that the amendment to said section of the Code of Civil Procedure, which became effective prior to the commencement of the action, was retroactive as well as prospective and that the action was maintainable. Hopkins v. Lincoln Trust Co., 257.

See **Vendor and Purchaser.**

FRAUDULENT CONVEYANCES.

Debtor and creditor — Judgments — Bona fide purchaser for value — Evidence — Real Property Law, § 266 — *Code Civ. Pro.* § 1251. — Under section 263 of the Real Property Law a conveyance of real property made by a debtor in fraud of creditors prior to the docket of a judgment against him is void, and the lien of the judgment, by virtue of section 1251 of the Code of Civil Procedure, attaches notwithstanding such conveyance. Where, however, it appears that before plaintiff's judgment had been docketed the fraudulent grantee of the judgment debtor, a brother-in-law, conveyed the property to one who it was conceded paid full value for it, and in an attack upon the last conveyance on the ground that the grantee, who had made payments on account of the purchase price

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FRAUDULENT CONVEYANCES — Continued.
before he had any notice which could possibly be said to charge him with bad faith, and for which in any event he would have a lien on the property, did not take the conveyance in good faith, it appears that the judgment debtor, representing to said grantee that he owned the property, entered into a contract to convey, and, upon a search of the title, the prior conveyance was disclosed, the judgment debtor said that the property was held for him by the grantee therein, who signed the deed to the last grantee, who paid the full consideration to the judgment debtor, the proof is insufficient to establish that the last grantee was not a *bona fide* purchaser in good faith, and he comes within section 266 of the Real Property Law and the conveyance to him is good. Feuer v. Schaller, 229.

GAS AND ELECTRICITY.
See **Injunctions.**

GREATER NEW YORK CHARTER.
See **Session Laws cited, ante, p. xliv; Bridges; Taxes.**

GUARDIANS.
Infants — Guardian of property has preference over guardian of person in being appointed administrator.— The guardian of the estate of an infant, who is the sole surviving next of kin of his deceased mother, will be appointed administrator of her goods, chattels and credits in preference to another who, as the guardian of the infant's person, has no authority to receive, hold or manage the infant's property. Matter of Florence P. McGuire, 84.

HUSBAND AND WIFE.
1. *Although a wife is not entitled to an allowance for maintenance pending an action to annul the marriage, the husband is liable for her support until decree of nullity is entered.*— In an action to annul a marriage the defendant's wife is not entitled to an allowance for maintenance. Although a motion for alimony and counsel fee in a wife's action for an annulment of her marriage to defendant has been denied, defendant's motion to vacate an order theretofore made in a proceeding in the Domestic Relations Court directing him to pay her a certain sum per week toward her support is properly denied upon the ground that until the entry of a decree of nullity, the marriage is valid, and the husband must keep his wife from the likelihood of becoming a public charge. People ex rel. Heinle v. Heinle, 469.

2. *Boate v. Boate*, 114 *Misc. Rep.* 321, *affirmed.* Boate v. Boate, 689.

3. *The burden of proving the invalidity of a second marriage is upon the one who asserts its invalidity — Equitable jurisdiction of Surrogate's Court — Evidence — Accord and satisfaction.* Matter of Emma L. Tyrrell, 714.
See **Evidence.**

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HIGHWAYS.

State liable in damages for elevating grade of highway — Brooks v. State of New York, 189 App. Div. 24, followed. Myers v. State of New York, 678.

INDICTMENT.

See **Criminal Procedure.**

INJUNCTIONS.

1. *When injunction pendente lite granted — Actions — Conspiracy — Labor unions — Pleading.*— Where the complaint of a manufacturer of dresses and a member of the "Dress and Waist Manufacturers Association" clearly sets forth a good cause of action against the principal, general and local officers and certain members of the "International Ladies' Garment Workers Union," a national organization, in charging them with conspiring to cause plaintiff's factory to shut down and that they are wrongfully instigating the employees to quit work, the plaintiff upon all the facts alleged will be granted an injunction *pendente lite* as it appears that the complaint sets out a cause of action against all of the members of the union. Floersheimer v. Schlesinger, 9.

2. *Temporary — Statutes — Gas companies — Rates — Federal courts — Leave to intervene denied public service commission — Public Service Commissions Law, § 65.*— While defendant, presumably pursuant to an order of the public service commission, was making a charge of ninety-five cents per 1,000 cubic feet for gas furnished to private consumers, it brought an action in a federal court against the public service commission and others with result that a decree was duly entered adjudging that both the statute (Laws of 1906, chap. 125) fixing the maximum rate at one dollar per 1,000 cubic feet and the act (Laws of 1916, chap. 604) purporting to amend the same, were unconsitutional as confiscatory and restraining the enforcement of either of said statutes. Two days after the entry of such decree defendant filed with the public service commission a schedule increasing its rate to one dollar and a half and immediately began to charge its private consumers at that rate. *Held,* that in an action to have the dollar and a half rate adjudged excessive and exorbitant, the fact in issue could not be determined upon affidavits on a motion for a temporary injunction restraining the receipt by defendant of any sum based on such rate or in excess of the ninety-five cent rate, and that plaintiff's presentation of facts did not point so clearly to his ultimate success in the action as to justify the granting of the motion. Upon the entry of the decree in the federal court action, which by express reference thereto adjudged the invalidity of the statute of 1906, irrespective of the amendatory act of 1916, the ninety-five cent rate became ineffective and cannot be enforced as *prima facie* compensatory. There was, therefore, no legal barrier which prevented the defendant fixing a rate deemed by it to be reasonably remunerative in the absence of any rate prescribed either by the legislature or by the public service commission. Morrell v. Brooklyn Borough Gas Co., 113 Misc. Rep. 65 distinguished. The presumption that the reasonableness of a dollar and seventeen cent rate established by a finding in the federal court action would continue for several months, was negatived and

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INJUNCTIONS — Continued.
destroyed by proof of changed conditions, and defendant was also entitled to invoke the presumption that it had not violated section 65 of the Public Service Commissions Law by fixing an unreasonable rate. Motion for an injunction granted to the extent of restraining defendant from removing its meter from plaintiff's house or shutting off the supply of gas for failure to pay the increase over the ninety-five cent rate prior to the expiration of thirty days from the date of defendant's filing its new schedule, and in all other respects denied. The court will not either directly or indirectly sanction a violation of the decree of the federal court and until an application by the public service commission for a modification of said decree is granted, its motion for leave to intervene will be denied but a motion by the city of New York for leave to intervene will be granted. Duitz v. Kings County Lighting Co., 14.

3. *Pendente lite — Strikes — When motion for injunction granted — Labor unions — Associations — Contracts.*— Where in an action brought by a manufacturer of clothing to perpetually and permanently enjoin the principal, general and local officers and certain members of the "Amalgamated Clothing Workers of America," a national organization having local unions under its jurisdiction, from doing acts injurious to plaintiff's business and for an adjudication that said association is a conspiracy in restraint of trade, it appears from the papers on a motion for an injunction *pendente lite* that, since the defendant union had called a strike, plaintiff had determined and done everything in its power to return to an "open shop" policy, and there is ample proof of plaintiff's claim that defendants are guilty of calling the strike, picketing the plaintiff's premises, interfering with employees and workers of plaintiff and with their contracts of employment, and in general of unlawfully instigating, advising and directing acts of various kinds against plaintiff and its business, the motion for the injunction will be granted. Schwartz & Jaffee, Inc., v. Hillman, 61.

4. *When injunctive relief granted — Motor vehicle line — Municipal corporations — Licenses — Statutes — Transportation Corporations Law,* §§ 25, 26 — *Carriers — Penal Law,* §§ 29, 1937.— One who operates a motor vehicle line in a city without first obtaining the consent of the municipal authorities and without thereafter procuring from the Public Service Commission a certificate as to the necessity and public convenience of such business, violates sections 25 and 26 of the Transportation Corporations Law. Where one without a license so obtained operates a motor vehicle line or route over the streets of the cities of Albany, Watervliet and Troy or in and along the highways connecting said cities, with vehicles for carrying passengers, in competition with another common carrier, which, as required by statute, has obtained the consent of the local authorities of said cities to operate over the streets thereof, such operation without a license will be restrained by injunction upon the application of the other common carrier. While the failure to comply with the aforesaid provisions of the Transportation Corporations Law is a misdemeanor under section 29 of the Penal Law, punishable by fine or imprisonment or both under section 1937 thereof, the court will not compel parties whose rights are clear to

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rely on peace officers to protect them in their enjoyment of such rights, and may grant injunctive relief. United Traction Co. v. Smith, 73.

5. *When action to enjoin payment of pension dismissed — Charter, city of Buffalo,* § 264(1) — *Police.*—A member of the police force of the city of Buffalo was detailed for duty at the car shops of the New York Central Railroad Company during a strike, and availing himself while on duty, of permission granted by his superior officer, to eat at the commissariat or lunch counter provided by the railroad company for its employees, partook of food which produced ptomaine poisoning, from which he died, as found by the trustees of the police pension fund. In an action to enjoin payment of a pension granted to said member's widow, *held,* that he died from the effects of "an injury while in the actual discharge" of his duties as a police officer within the meaning of section 264(1) of the city charter, and the complaint in an action to enjoin payment of the pension will be dismissed, but without costs. Glasser v. City of Buffalo, 91.

6. *When will be denied — Transit commission contracts — Laws of 1921, chap.* 134.— The statute (Laws of 1921, chap. 134) creating the transit commission vests it, as successor of the local authority of the city of New York, with power "to approve contracts and modifications of contracts under any provisions of the Rapid Transit Act or any contract heretofore made and in respect of any power or right of approval under any law or contract and including any power or right of approval of modification of any contract" and in case the local authority should finally fail to approve the contract or contracts formulated under a plan of adjustment, readjustment and rehabilitation provided in said statute, "to execute and deliver such contracts in the name and in behalf of the city, with full legal force and effect as if all approvals by the local authority or any local officer had been given." *Held,* that in an action by the city for an injunction to restrain the transit commission from the positive performance of duties and functions transferred to it from pre-existing commissions by virtue of said statute, which said duties and functions it is alleged are in their essence a direct invasion of constitutional rights and privileges of plaintiff, the court has no inherent power to right the wrong unless thereby the civil property or personal rights of the city, as a proprietor, in contradistinction from the rights in common of the body of the people of the city, are affected. Where the relief asked for is based upon an allegation that the transit commission, the defendants herein, are about to and will grant new pretended consents under the form of contracts which they will make for and in the name of the plaintiff with various street railroad companies and said contracts will purport to relieve the companies from the obligation of compliance with the provisions, conditions and obligations theretofore imposed and that said defendants will modify and alter provisions and conditions of the contract and restore and validate rights of operation which the local authority has forfeited, and that such acts will result in irreparable financial injury to the plaintiff, its

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INJUNCTIONS — Continued.
people and inhabitants, the injunction will be denied and judgment rendered for defendants. City of New York v. McAneny, 433.

7. *When dependent upon statute in force when relief awarded — Statutes, construction of — Grade crossings, elimination of — Limitation of cost to city — Railroad Law, § 95-a, added by Laws of 1921, chap. 663 — General Municipal Law, § 51.*— The rights of the plaintiff in a suit asking for injunctive relief, when dependent upon statute, are to be determined with reference to the statute in force at the time when the relief, if any, is to be awarded. In a proceeding instituted in 1917, by the city of Kingston, N. Y., before the public service commission for the elimination of a grade crossing in said city, an order was made on April 1, 1920, which after directing that the cost of construction of sidewalks, etc., provided for, the cost of relocating or reconstructing sewers and water mains and the costs of and incidental to the acquisition of additional land or resulting from consequential damages, in excess of $125,000, should be borne solely by the city, recited that it, said order, was granted upon the distinct understanding that the cost of construction, acquisition of land, etc., was not to be construed as part of the elimination or be in any way chargeable to the elimination account or paid for out of funds appropriated by the legislature for the abolition of grade crossings, and that the city's acceptance of the order should be deemed an undertaking on its part to fulfill obligations imposed upon it by said order. Immediately after approval by the mayor of a resolution of the common council and before chapter 663 of the Laws of 1921 became a law, plaintiff, a qualified taxpayer of the city, commenced this action under section 51 of the General Municipal Law to enjoin the carrying out of the agreement imposed by the order of the public service commission and to annul said agreement and have it declared illegal in so far as thereby the city was required to pay more than twenty-five per cent of the expense of the elimination. Chapter 663 of the Laws of 1921 became a law on May 7, 1921, and amended chapter 481 of the Laws of 1910 (Cons. Laws, chap. 49) by the insertion therein of section 95-a of the Railroad Law. *Held*, that the well settled rule of construction that if there be any inconsistency between the older and later provisions of a statute, the earlier must give way, applied, and that under the statute of 1921, which was in effect when the decision herein was made, the costs of construction of the sidewalks, pavements, sewers and guard-rails and the cost of relocating or reconstructing existing sewer and water mains, and the costs of and incidental to the acquisition of additional land, or resulting from consequential damages, in excess of $125,000 which by the provisions of the order of the public service commission were to be borne solely by the city, are elements of the costs of eliminating said grade crossing to be added to the other expenses of the elimination, together with all contributions made by the steam surface lines including the thirty-one foot strip of land, but not including the expenses of the trolley lines set forth in said order; and that the city's share of said expense to be apportioned by the public service commission, shall in no event exceed fifty per cent of the entire expenses of such elimination. An injunction granted restraining the defendants from paying more than fifty per cent of the

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INJUNCTIONS — Continued.
expenses of the elimination of such grade crossing, such items of expense to be made up as indicated in this opinion. Coykendall v. City of Kingston, 557.

8. *Continuation of temporary — Strikes — Organizations engaged in strikes responsible for all lawlessness growing out of strikes which they could have avoided by reasonable discipline imposed upon their members — An injunction will not be vacated upon affidavits where the acts enjoined are illegal and tend to a breach of the public peace, although the alleged facts upon which the injunction is based are substantially denied by the opposing affidavits.* United Traction Co. v. Droogan, 672.

INSURANCE.
1. *When policy of accident insurance not subject to alteration — Cancellation of policy.*—A policy issued with intention to insure the property then described by the insured, is not subject to alteration by him or by the court, and if in an action to reform the policy so that it will cover an automobile which had recently been in a collision, his contention that the policy does not cover a machine owned by him at any time, is correct, he may not be heard to object to a cancellation of the policy and the return of the premium. Zap v. United States Casualty Co., 634.

2. *Guaranty — Evidence — Liquidation of surety company — A judgment procured in the United States District Court for the Eastern District of Washington is prima facie evidence of damage — Insurance Law,* § 63. Matter of People (Empire State Surety Co.), 745.

INTEREST.
Interest on legacy should be paid from one year after the grant of letters — Interest on trust fund from date of death of testator — Rate of interest. Matter of William H. Brown, 710.

See **Damages; Executors and Administrators.**

JURISDICTION.
Courts of equity are not vested with power over appointment or removal of public officers.— A court of equity is not vested with power over the appointment and removal of public officers. Jurisdiction to determine the title to public office belongs exclusively to courts of law and is exercised either by certiorari, mandamus, prohibition or quo warranto, in accordance with common law procedure or statutory direction. The standing of the city of New York in a court of equity in its proprietary capacity is no greater than that of any private litigant. City of New York v. McAneny, 433.

See **Court of Claims; Surrogate's Court.**

JURY.
See **Criminal Procedure.**

LABOR UNIONS.
See **Injunctions.**

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LANDLORD AND TENANT.

1. *When tenant discharged of his duty to pay rent when use of premises is restricted by law — Constitution of the United States, Eighteenth Amendment — Volstead Enforcement Act.*— The rule that where a party by contract creates a duty upon himself, he is bound to make good if he can, notwithstanding any inevitable accident or unforeseen contingency, has no application where performance becomes impossible by a change in the law or as a result of action taken under governmental authority. Since the adoption of the Eighteenth Amendment to the Constitution of the United States and the enactment of the Volstead Enforcement Act, the tenant under a written lease which in terms limited and restricted its use of the premises to the saloon business, is discharged of its duty to pay rent from and after the date when said amendment became effective. Doherty v. Eckstein Brewing Co., 175.

2. *Monthly tenancy — When landlord may recover a fair and reasonable rent from tenant holding over — Service of notice not a condition precedent — Laws of* 1882, *chap.* 203, *as amended by Laws of* 1920, *chap.* 209.— Where a monthly tenant of premises in the city of New York holds over after the expiration of his term, without the permission of his landlord, the landlord under chapter 944 of the Laws of 1920 may recover a fair and reasonable rent while the tenant continues in possession of the premises, and a dismissal of the complaint on the ground that service upon the tenant of the notice specified in chapter 203 of the Laws of 1882, as amended by chapter 209 of the Laws of 1920, was a condition precedent to the maintenance of the action, is error for which a judgment entered in favor of the tenant will be reversed and a new trial ordered. Rogan v. Weiss, 193.

3. *Apartment houses — Different rentals for similar apartments in same building — A tenant is not entitled to a reduction in his rent below the reasonable value of his apartment because other tenants voluntarily pay sufficiently high rents to produce a fair return upon the whole property — A landlord still has the right to accept from a tenant, willing to pay, the rent demanded.*— Notwithstanding the recent legislative enactments, a landlord still has the right to accept from a tenant, who is willing to pay, the rent demanded for premises in the city of New York. The landlord of an apartment house in the city of New York may reasonably, in proper circumstances, enter into agreements of lease with various tenants at different rentals for similar apartments in the same house, and all the leases are enforceable unless any particular tenant can show that he is actually injured by the landlord's use of his property, and has been compelled to enter into a lease which by the terms thereof is oppressive and unreasonable, and the mere fact that the landlord is receiving from certain of the tenants a rent sufficiently high to afford him an adequate return upon his capital investment, does not entitle the other tenants to a reduction below the amount at which similar apartments in the neighborhood are leased and below the rate which, if generally applied throughout the house, would afford the landlord a fair return on the whole property. Where such a landlord does not obtain more than a reasonable return upon his investment as a whole but having acted

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LANDLORD AND TENANT — Continued.
reasonably in fixing the widely varying rents for the various tenants, has compelled no tenant to enter into a lease which is oppressive or unreasonable, the tenant paying the higher rent has suffered no injury for which the legislature has attempted to provide a remedy. Even though the court might consider the rent reserved in some of the leases unreasonable, only the tenant who pays the same is aggrieved, and no other tenant can compel the landlord to allow him to remain at a lower rental than would otherwise be reasonable, merely because the landlord will obtain a fair return upon his whole investment through the higher rents paid by other tenants. Where in an action for rent the court upon evidence as to the value and maintenance of plaintiff's apartment house and the rents received therefrom, refuses to permit the landlord to raise the rent of defendants in spite of the fact that the evidence showed that all other tenants in the building are paying the same rent for similar apartments, as the landlord has demanded and seeks to recover of defendants, and that such rental is not higher than the prevailing rate for apartments of the same class in that neighborhood, and there is no evidence from which an inference may be drawn that the rent fixed by the trial justice is fair and reasonable, a judgment in favor of defendant will be reversed and a new trial ordered. Elvira Realty Co., Inc., v. Bracegirdle, 197.

4. *Use and occupation — Meaning of "rents" in section 4, chapter 944, Laws of 1920.*— Where a tenant in possession of premises in the city of New York under a lease which expired on September 30, 1920, remained in possession of the premises without any new agreement having been made, the landlord under chapter 944 of the Laws of 1920 may maintain an action against the tenant to recover the rental value of the use and occupation of the premises. The word "rent" in section 4 of chapter 944 of the Laws of 1920 means a reasonable return from the property. Weil v. Lesser, 241.

5. *Guaranty payment of rent — Assignment of lease — Meaning of "legal representatives"— When guarantor liable to assignee of landlord.*— The term "legal representatives" in a guaranty of payment of rent under a lease is broad enough to include an assignee of the landlord's interest in the lease. In the absence of proof as to the intention of the parties to a guaranty of the payment of rent under an assignable lease which binds and runs in favor of not only the landlord and the tenant but also their respective successors in interest, the guarantor is liable to the assignee of the landlord for the tenant's default in the payment of rent, though the guaranty runs to the landlord and his "legal representatives." Lindenberg Corporation v. Howland, 244.

6. *Effect of Eighteenth Amendment to the Constitution of the United States upon lease of premises to be used as a "saloon and hotel."*— Where a case is submitted for decision upon statements of counsel the facts as stated by the appellant in the court below must be accepted as true on appeal. A covenant in a lease for five years made in 1916, of premises to be used and occupied as a "saloon and hotel," that the tenant will comply with all statutes "for the correction, prevention and abatement of nuisances or other griev-

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ances" does not cover the Eighteenth Amendment to the Constitution of the United States or any statute for the enforcement thereof. Before said constitutional amendment became operative the landlord and tenant orally agreed that after it became effective there should be a reduction in the rent, and for several months the reduced rental was paid and accepted. In an action to recover the rent for the succeeding month in the amount reserved in the lease, *held*, that the adoption of the said constitutional amendment created a situation not within the contemplation of the parties when the lease was made, and terminated it. Kaiser v. Zeigler, 281.

7. *Pleading — When allegation of duress not sustained — Laws of 1920, chap. 136.*— The authority of the judicial decisions that chapter 136 of the Laws of 1920 has no application to leases made prior to April 1, 1920, has not been affected by the decision in *People ex rel. Durham Realty Corp.* v. *LaFetra*, 230 N. Y. 429. While a two years' lease was still subsisting, the parties on March 25, 1920, entered into a new lease for a like term, to commence at the expiration of the old lease but at an increased rental. In an action to recover the first month's rent under the new lease the answer, besides alleging that the rent demanded was unjust and unreasonable, and that the agreement under which recovery was sought was oppressive, contained allegations to the effect that the new lease was executed under duress. *Held*, that a judgment in favor of defendant could be sustained only upon proof that he was entitled to be relieved of his obligations under the new lease because it was obtained by duress on the part of the landlord. In the absence of proof that the landlord could not have obtained from other persons the same rental as he exacted from defendant, or that he derived any special advantage from making a contract with defendant instead of with another, he was not even bound to first give defendant an opportunity to renew his lease upon any terms. Under the circumstances disclosed by the evidence, allegations of the answer to the effect that the new lease was executed under duress held not to have been sustained and the judgment in favor of defendant dismissing the complaint will be reversed and judgment directed for plaintiff for the amount claimed. Sylvan Mortgage Co., Inc., v. Stadler, 311.

8. *Summary proceedings — Tenant holding over — Damages — Code Civ. Pro.* § 2253.— The tenant under a lease to begin upon the expiration of the term of a prior lease cannot maintain summary proceedings against the tenant in possession. In such circumstances the landlord may maintain summary proceedings against the tenant holding over, and where he has secured a final order awarding him possession of the premises, the issuance of the warrant of removal does not prevent him from subsequently recovering by action under section 2253 of the Code of Civil Procedure the reasonable value of the use and occupation thereof, to the time when the warrant was issued. The landlord's right of action for damages for breach of the tenant's covenant to surrender the premises at the expiration of the term, survives a summary proceeding for his removal, and where the lease with the second tenant specifically provides that the rent shall not be paid until possession is given, the plaintiff in the

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LANDLORD AND TENANT — Continued.
action is entitled to recover of the defendant, as for use and occupation, the rent called for by the second lease, while plaintiff was kept out of possession, but the counsel fee and expenses of the summary proceeding are not proper elements of damage in said action. Marbridge Building Co., Inc., v. White, 320.

9. *Option to purchase premises must be exercised during term of original lease and not of renewal lease — Specific performance not decreed where option exercised during renewal term.*— There is a clear distinction between a renewal of a lease on the same or similar terms and conditions as are contained therein, and a new lease containing like agreements and covenants. By a three years' lease the tenant was given an option for a renewal for a like term upon "the same terms and conditions" and also an option to purchase the leased premises and those adjoining "at any time during the term and existence of lease." The tenant during the renewal term, but not before, gave the notice provided for by the lease, of his election to exercise the option of purchase and tendered the purchase price, which was refused. *Held,* that the tenant not having within the term of the original lease exercised the right to purchase which was an independent covenant collateral to the demise, though contained in it, the landlords were entitled to judgment in an action to compel specific performance of the option. Masset v. Ruh, 459.

10. *Method of determining reasonable rent in the city of New York — Burden of proof — Deductions — Laws of* 1920, *chap.* 944.— While the price or value of a building and its rental value stand in a certain necessary relation to each other, the ratio between the rent of land and the price thereof varies widely. In twenty-two actions to recover $125,000 rent for apartments in a building used for dwelling purposes in the city of New York under leases made between April 1, 1920, and September 27, 1920, when chapter 944 of the laws of that year went into effect, and which leases contained no provision making an adjoining playground appurtenant to the demised premises, the defense interposed was that the rent was unjust and unreasonable and that the agreements under which recoveries were sought were oppressive. It appeared on the trial that in 1918 the landlord paid $575,000 for the premises and in addition claimed a liability of $75,000 under an option given to its grantor to purchase back the premises upon payment of that amount. Although the plaintiff claimed that the property is worth $750,000, the cost of reproduction, it further appeared that the gross income of the property amounts to $103,000. The verdict of the jury in favor of defendants was based upon the sum of $688,000, the assessed valuation of the property for the year 1920–1921, but that valuation included vacant adjoining premises assessed for 1921 at $88,000, which, under a former owner, was laid out as a playground and used exclusively by the tenants, but since acquired by plaintiff, has been shut off. Upon denying a motion to set aside the verdicts as contrary to law and the evidence, and upon all the grounds specified in section 999 of the Code of Civil Procedure and section 129 of the Municipal Court Code and for a new trial, *held:* That the jury had a right to consider that the playground was not a part of the demised premises, thus reducing the value, as assessed, to $600,000,

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LANDLORD AND TENANT — Continued.
somewhat over six times its rental value. That the burden was upon plaintiff to reasonably satisfy the jury that it was entitled to allowances for depreciation, repairs, collection, etc., but that the jury were not bound to allow all deductions claimed. Jash-Lap Realty Co., Inc., v. Fishman, 485.

11. *Use and occupation — Landlord entitled to reasonable income on his investment in the city of New York — Evidence of market value of property incompetent — Bill of particulars — Laws of* 1920, *chap.* 944.— Where the tenants of a dwelling house in the city of New York, without the permission of the landlord, hold over and continue in possession after September 30, 1920, when their leases expired, the landlord, under chapter 944 of the Laws of 1920, is entitled to bring an action to recover a fair and reasonable rent while the tenants remain in possession, but he may recover only such rentals as will yield a reasonable income on his investment. In such an action, evidence as to the present market value of the premises largely based upon the excessive rentals charged by owners of similar property, which led to the emergency which the statute declared existed and which it was intended to remedy, is incompetent on the ground that to receive it would be to justify extortionate demands by proof that they have resulted in an increase in the market value of similar property, and the admission of such evidence over the objection and exception of the defendants was error for which a judgment in favor of the plaintiff will be reversed and a new trial ordered. The provision of the statute relating to the bill of particulars to be filed by a landlord cannot be deemed to include matters dealing with present market values which can in no sense affect the net income to which the landlord was entitled, and the granting of a motion for leave to amend the bill of particulars to conform to the proof was also erroneous. The purpose of the provision for the bill of particulars is to limit the landlord to such proof as may be met by the tenant as to the amount of investment from which the landlord is permitted to realize a reasonable income and the cost of maintenance of the premises, but an item of annual expenses for salaries of officials of the plaintiff, which evidently formed some basis for the rental value fixed by the court, is not justified. Hall Realty Co. v. Moos, 506.

12. *Notice of renewal under terms of lease — Landlord in foreign country — Summary proceedings.*— A lease containing an option of renewal providing the tenant ninety days previous to December 1, 1920, when the lease would by its terms expire, gave notice of his desire to procure the new lease, was assigned by consent of the landlord and said assignees on August 16, 1920, by a postpaid letter which though directed to the landlord at a wrong address he did not deny having received, elected to renew the lease. The landlord, for forty-five days more than ninety days next preceding the expiration of the original lease, was in a foreign land. *Held*, that a final order in summary proceedings against the assignees of the lease as holdovers will be reversed and a new trial granted. Giordano v. Zap, 619.

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LANDLORD AND TENANT — Continued.

13. *Purchaser of property from landlord cannot, before taking title, take advantage of a cancellation clause in the lease — Summary proceedings.*—A six months' notice to a tenant to remove from the premises by one not having title thereto does not operate to cancel the lease or require the tenant to quit the premises. A lease provided that if within five years from May 1, 1906, the tenant did not exercise his privilege under the lease to tear down the building and erect a new one in its place, the landlord should have the right to cancel the lease upon giving a six months' written notice effective at the expiration of the term and upon payment of a certain sum of money. Neither of the parties took any action under the lease. *Held,* that a six months' written notice to quit given to the tenant by the landlord's grantee of the premises prior to taking title, in its own name, was insufficient, and a final order in a summary proceeding awarding said grantee possession of the premises will be reversed on the ground of failure to give the notice required by law. Broadway-Johns Street Corp. v. Huyler's, 621.

14. *Recovery of possession of apartment for use of landlord and family — Demand must be in good faith — Laws of* 1920, *chap.* 942.— In a proceeding to recover possession of a tenant's apartment on the ground that it was to be used forthwith for the landlord and his family, the only condition imposed by the statute (Laws of 1920, chap. 942) is that the demand for possession must be made in good faith. A final order granting a motion to dismiss the proceeding unless the landlord agreed to exchange apartments with the tenant is unauthorized and will be reversed and a new trial ordered. Dreyer v. Wiers, 629.

See **Summary Proceedings.**

LEASE.

Option to purchase — When specific performance will not be decreed.— Where a lease provides that if at any time the lessor decides "to sell the premises" the lessees shall have the preference at such sale, specific performance of the option to purchase may not be decreed in the absence of proof that the lessor ever decided or had tried or offered to sell the premises. Lewis v. Ludlam, 347.

See **Foreclosure; Landlord and Tenant.**

LEGACIES.

See **Executors and Administrators; Interest; Wills.**

LEGISLATIVE AUTHORITY.

See **Witnesses.**

MANDAMUS.

When writ will issue upon the application of a private citizen requiring the mayor of a city to enforce section 26 *of the Transportation Corporations Law — Transportation Corporations Law,* § 26 — *Second Class Cities Law,* § 54 — *Public Service Commissions Law,* §§ 48, 56(2), 57, 58 — *Penal Law,* § 29.— Where a clear legal right exists and there is no other adequate remedy, a writ of mandamus may issue in the discretion of the court. A mandamus proceeding to enforce a right in which the general public

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MANDAMUS — Continued.
is interested, to wit, that the streets of a city shall remain unobstructed and unencumbered, may be maintained by a citizen and resident of the city. Where it is made to appear that in the city of Albany, for at least six weeks, more than 500 motor vehicle lines of the character described in section 26 of the Transportation Corporations Law, which in the interest of the public welfare prohibits bus lines or any vehicles carrying passengers at a rate of fare of fifteen cents or less for each passenger within the limits of the city, have been and are now being unmolestingly operated upon the public streets of the city without the consent of the local authorities and without a certificate of public necessity and convenience from the public service commission, as required by said section of the Transportation Corporations Law, and it further appears the mayor of the city, one of whose duties under section 54 of the Second Class Cities Law is to see that the laws of the state are executed, has openly and publicly announced his positive refusal to perform such duty, a writ of mandamus upon the application of a citizen of the state who is also a resident of the city, will be granted requiring the said mayor to direct the commissioner of public safety, who is neither a proper nor necessary party to the present proceeding, to enforce by action of the police department of the city, the provisions of section 26 of the Transportation Corporations Law. In such case, neither a direction of the public service commission to its counsel to proceed under section 48 or section 57 of the Public Service Commissions Law, which means that each individual operating a jitney unlawfully must be proceeded against separately, or to conduct a summary proceeding in the Supreme Court to have the unlawful act enjoined, can, in the extraordinary situation presented here, be deemed an adequate remedy. Violations of the provisions of section 26 of the Transportation Corporations Law are punishable as misdemeanors, not only under section 29 of the Penal Law but also under section 56(2) and section 58 of the Public Service Commissions Law. People ex rel. Weatherwax v. Watt, 120.

MASTER AND SERVANT.

Negligence — When employer not liable for negligent act of employee acting without the scope of his employment — Personal intermeddling.— While plaintiff, the regular operator of the freight elevator in an office building, was waiting for the operator of the passenger elevator to finish his shift at one o'clock, she was told by the superintendent of the building to clean the hall, and while so engaged a collector of packages for an express company requested her to take him up in the freight elevator. While she went to obtain the superintendent's permission to do so, the package collector entered the elevator and proceeded with it to the tenth floor, and upon plaintiff's return, apparently finding the elevator in the same position, she stepped into the vacant elevator shaft and was injured. In an action against the express company, *held*, that in the circumstances the package collector's use of the elevator was not within the scope of his employment as an employee of the defendant, but constituted personal intermeddling, and an order setting aside a verdict in plaintiff's favor, as contrary to law, will be affirmed, with leave to appeal to the Appellate Division. Besnar v. American Railway Express Co., 515.

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MECHANICS' LIENS.
See **Mortgages.**

MORTGAGES.
1. *Action to reform mortgage — Priority of mechanics' liens — Recording.*— The right to have a mortgage containing no description of the real property intended to be covered thereby reformed in that particular, is subject to the rights under a mechanic's lien filed against the property after the mortgage was recorded. Schwartz v. Rappaport, 227.

2. *Purchase money — Foreclosure — Infants — Guardian ad litem — Laches.*—After the commencement of an action to foreclose a purchase money mortgage given by defendant, when she was under eighteen years of age, upon a conveyance of real estate to her by plaintiff, one to whom, between the commencement of the action and the entry of judgment, defendant had conveyed the premises under a trust agreement for her own benefit, took the defendant to a reputable attorney who interposed in their behalf an answer and the decision of the court on the trial of the issue raised by the answer of said defendants was the basis of the judgment of foreclosure and sale. Defendant having failed to inform said attorney or any other of the interested parties that she was not of age no guardian *ad litem* was appointed for her, and the action proceeded as though she was an adult. She became of age about a year after the judgment in foreclosure and nearly a year and a half later brought an action to set aside the conveyance made by her but the judgment therein rendered established that she was indebted to her grantee in an amount which included the sum advanced by him for the assignment to him of the foreclosure judgment; that he held the premises in question for the benefit of plaintiff and that she was entitled to a reconveyance thereof upon payment by her of the sum so found due and owing, and it was specifically determined in and by said judgment that the mortgage in question here was a valid obligation and that plaintiff, having elected to retain the property, must pay its consideration. *Held*, that her motion to vacate and set aside the judgment of foreclosure and for leave to interpose an answer will be denied, and whether the failure to appoint a guardian *ad litem* for her in the foreclosure action was merely an irregularity or an error of fact not arising upon the trial, was immaterial. The moving party having for nearly five years after she, concededly, knew all the facts, engaged in constant effort to claim the benefits and avoid the obligations of her contract, it must be held that she, in attempting nearly seven years after she became of age, to disaffirm the mortgage, did not act within a reasonable time. Frankel v. Rubin, 566.

See **Foreclosure.**

MOTIONS AND ORDERS.
Examination of third person in supplementary proceedings unauthorized — Void Municipal Court judgment — Municipal Court, city of New York, Code, §§ 6(7), 129; *Rule* 9.— Where upon granting a motion in the Municipal Court to restore a cause marked "reserved generally" to the trial calendar as required by rule 9, Municipal Court Rules, no formal order is made and entered, the defendant,

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MOTIONS AND ORDERS — Continued.
by not appearing on the day an inquest was taken, is neither guilty of neglect or omission and is not in default. The judgment so rendered in the absence of the defendant was therefore void, and an order for the examination of a third person in proceedings supplementary to execution issued upon the transcript of said judgment, which was filed a year and four days after the original entry of judgment, is unauthorized and will be vacated and set aside, even though a motion by defendant under section 6(7) of the Municipal Court Code, to vacate and set aside the judgment as unauthorized and void, was denied on the ground that under section 129 of said Code the motion should have been made within a year after the original entry of judgment. Stoneware Electric Stove Works v. Barrett, 605.

MUNICIPAL COURT CODE.
See **Municipal Court Code cited, ante, p. xlvii.**

MUNICIPAL CORPORATIONS.
See **Bridges; Canal Law; Injunctions.**

MUNICIPAL COURT OF CITY OF NEW YORK.
1. *Jurisdiction — Seaman's wages — Ships and shipping — Judgments.*— The Municipal Court of the city of New York has jurisdiction of an action brought by a seaman to recover wages, and an order dismissing the complaint on the ground that the court had not jurisdiction, and the judgment entered thereon, will be reversed with leave to defendants to serve an answer. Danielsen v. Sigsbee, Humphrey & Co., Inc., 184.

2. *Summary proceedings — When order should be made before justice before whom proceedings were instituted — Statutes — Laws of* 1920, *chap.* 942 — *Final warrant in "pending proceedings" can only issue upon additional proof.*— Orderly practice requires that a motion to dismiss the petition in summary proceedings in the Municipal Court of the city of New York against a tenant as a holdover, should be made before the justice before whom the proceeding was instituted. While, therefore, pending procedings properly initiated and sustained by proof sufficient to entitle the landlord to a final warrant under the law as it existed at the time of the trial, may proceed to the entry of the final order of removal, the final warrant may not issue except upon additional proof. Upon the hearing in a summary proceeding against a tenant as a holdover after the expiration of his term, the landlord consented to give a lease for one year from October 1, 1920, to each of the tenants in the building, at such rental as the court should determine was reasonable, and, on the theory that a final order was directed for the landlord, the testimony was confined to matters relevant to the tenant's application for a stay pursuant to chapter 137 of the Laws of 1920. The trial justice, upon final submission of the case, and two days after chapter 942 of the Laws of 1920 went into effect, handed down an opinion in which he found that the landlord was entitled to a rental from the tenant herein in a certain sum per year. *Held*, that although the petition did not allege the facts necessary to bring the landlord

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MUNICIPAL COURT OF THE CITY OF NEW YORK — Cont'd.
within the exceptions mentioned in said chapter 942, the court was without legal power to enter an order dismissing the proceedings, and the order will be reversed and the motion to dismiss denied, with costs of the motion. Levy v. Baum, 201.

3. *Jurisdiction — Negligence — Ships and shipping — Municipal Court Code,* § 6.— Under section 6 of the Municipal Court Code, the Municipal Court has jurisdiction of an action to recover for personal injuries where the injury complained of occurred upon a vessel in the navigable waters of the city of New York. La Rosa v. Carter Weekes Stevedoring Co., 392.

See **Appeal; Motions and Orders.**

NEGLIGENCE.
See **Master and Servant.**

NEGOTIABLE INSTRUMENTS.
Check given for gambling debt void — Penal Law, § 993.— A check given in payment of a gambling debt is utterly void under section 993 of the Penal Law, and a judgment rendered in an action thereon in favor of a holder in due course will be reversed and the complaint dismissed, but with leave to appeal. Larschen v. Lantzes, 616.

NEW YORK CITY.
See **Bridges; Certiorari; Constitutional Law; Injunctions; Jurisdiction; Taxes.**

NEW YORK STATE.
See **Highways.**

NEXT OF KIN.
See **Adoption.**

OPTIONS.
Option for sale of real estate — When assignable — Lease — Consideration — Personal Property Law, § 41 — *Code Civ. Pro.* § 840.— Though an option for the sale of real property, until accepted, is not a contract for its sale, the option is assignable under section 41 of the Personal Property Law unless the parties by mutual agreement otherwise provide. The fact that the option was contained in a lease constitutes a good consideration for it, and, where a modification of the option reducing the purchase price and reciting that it was made in consideration of the original lease and the sum of one dollar, is under seal, a consideration, under section 840 of the Code of Civil Procedure, is presumed. Lewis v. Bollinger, 221.

See **Real Property.**

PARTNERSHIP.
Oral agreement — Statute of Frauds — Contracts — Consideration.—A consent to the cancellation of an oral agreement for a three-year partnership, given by one of the parties at the request of the other, is a sufficient consideration for his promise to pay a certain sum for such consent, and an action lies to recover any balance due thereon. Pinner v. Leder, 512.

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PENSIONS.
See **Injunctions.**

PERSONAL PROPERTY LAW.
See **Table Consolidated Laws cited, ante, p. xliii; Sales.**

PHYSICIANS AND SURGEONS.

When employer of injured employee liable for physician's services — Section 13 *of the Workmen's Compensation Law has reference only to fees incurred by workman for medical treatment.*— The claim of a physician for professional services rendered at the request of defendant's superintendent, to several of defendant's employees, who were injured in the course of their employment, is not a part of the injured workmen's claim under the Workmen's Compensation Law. The physician still retains the right to prosecute his claim by an action, and where neither the rendition of the services nor the reasonable value thereof is disputed, a judgment in favor of plaintiff for the amount claimed will be affirmed. Feldstein v. Buick Motor Co., 170.

PLEADING.

1. *When motion for judgment sustaining a demurrer to separate defense granted — Negligence — Award.*— Where in an employee's action for personal injuries alleged to have been caused by the negligence of the defendant the answer pleads as a separate defense that plaintiff made a claim for and accepted compensation from his employer, but there is no allegation that any award was ever made to plaintiff under the statute, a motion for judgment sustaining a demurrer to the separate defense will be granted. Godfrey v. Brooklyn Edison Co., 21.

2. *Breach of covenant — When covenant of quiet enjoyment not dependent upon payment of rent.*—A breach of covenant based upon the personal acts of the covenantor is sufficiently alleged by negativing the covenant. Where an allegation of the complaint in an action of covenant, that in the lease, which is neither set forth nor a copy attached, defendants covenanted that plaintiff should peaceably and quietly occupy the premises, is followed by allegations that plaintiff has not been permitted peaceably to occupy and enjoy the possession of the premises, but on the contrary after the commencement of the term and on dates stated "the defendants unlawfully and without authority in law and with force, entered upon the same and ejected this plaintiff therefrom and have ever since kept him out of possession," but there is nothing to show that defendants' covenant for quiet enjoyment was dependent upon plaintiff's payment of rent, the complaint is good on demurrer, though it fails to allege that plaintiff had paid the rent called for by the lease. If the covenant to pay rent was not a condition precedent the covenant for quiet enjoyment was independent, and the failure of the plaintiff to live up to his obligation is no answer to an action for defendants' breach of their covenant. Laveites v. Gottlieb, 218.

3. *When allegations as to employment do not show an agreement based upon a sufficient consideration.*— Allegations that plaintiff agreed to continue in the employ of defendants as salesman during

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PLEADING — Continued.
the season of 1918, to procure orders for furs, and that as compensation and for his commissions defendants agreed to pay him on all orders procured by him and accepted by them and for reorders on the same, "as follows," etc., do not show an agreement based on a sufficient consideration. In an action for commissions alleged to have been earned as salesman under the contract the plaintiff had a verdict by direction of the court, but a second cause of action pleaded in the complaint, for a wrongful discharge from employment, was dismissed. *Held,* that no error was committed either in dismissing the second cause of action or in denying plaintiff's motion to amend the first cause of action in order to increase the demand for damages: Wallach v. Mendelson, 499.

POWERS.
When personal and not in trust — Legacies — Executors.— A power vested in executors to sell real estate devised to the husband of the testatrix, subject to the payment of legacies, at such times and in such manner as they may deem advantageous, is personal, confidential and discretionary and there being no trust to sell the property for the payment of legacies, which must be paid by the devisee, an action to have a lien impressed upon the realty to the extent of the legacies will not lie. Clayton v. Kingston, 631.

PRESCRIPTION.
See **Claims.**

PRINCIPAL AND AGENT.
When limitation of agent's authority should be unequivocal — Life insurance — "Morris Plan" — Interlocking companies — Acceptance of overdue premiums — Waiver.— Where an agent is in complete control of a business a limitation upon his authority should be unequivocal. In an action brought by the beneficiary under a policy of life insurance issued by "The Morris Plan Insurance Society" in connection with a loan of money by the "Morris Plan Company" the defense was that the policy had lapsed for nonpayment of premiums and had not been reinstated. It was admitted, however, that prior to the death of the assured, all premiums had been paid in full to the "Company." *Held,* that whether the policy lapsed or not, plaintiff must prevail if the "Company" had power to bind the "Society" and reinstate the policy by its acceptance of overdue premiums. Where from the record on appeal by the defendant from a judgment in favor of plaintiff entered on a verdict, it appears that the defendant "Society" in truth and in fact was nothing more nor less than an adjunct or feeder or instrumentality of the "Company" and the evidence discloses that these interlocking companies in conducting their joint and interlocking business placed in each other a most explicit trust and that only in the most technical sense can the Company be regarded as the Society's agent, yet it must be held that the "Company" had authority to waive the lapse in the payment of premiums, if lapse there was, and the judgment appealed from will be affirmed. Fogg v. Morris Plan Insurance Society, 491.

PRINCIPAL AND SURETY.
See **Contracts; Landlord and Tenant.**

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PROBATE.
See **Executors and Administrators; Real Property; Wills.**

PROHIBITION.
See **Ejectment.**

PUBLIC SERVICE COMMISSION.
See **Injunctions; Statutes.**

PUBLIC OFFICERS.
Street improvements — Lack of authority of public officials — One dealing with municipal authorities does so at his own risk — Property owner not liable directly to contractor for improvements — Evidence. Peters v. Adams, 689.

See **Jurisdiction.**

RAILROAD CROSSINGS.
See **Injunctions.**

REAL PROPERTY.
Who is not a bona fide purchaser for value without notice — Wills — Vacating probate — Posthumous child — Damages.—After the executors under the will of a testator who died survived by his widow, an infant daughter and an unborn child, had conveyed certain real estate of their testator, the surrogate, upon vacating and setting aside the decree of probate on the ground that the daughter had not been legally represented by special guardian and that the posthumous child was not bound by said decree, opened the probate proceeding with leave to the daughter to file objections. No steps having been taken to reprobate the will, letters of administration were duly issued. In an action to remove an alleged cloud upon the title of the premises it appeared that, prior to taking title, plaintiff saw the posthumous child but claimed that he closed the transaction, throughout which he was not represented by an attorney, upon the assurance of the executors that they would reprobate the will, which claim was supported by the testimony of one of the executors, the lawyer who drew the will. *Held*, that in the circumstances plaintiff was not a *bona fide* purchaser for value without notice. That in the absence of proof of the existence of a valid will at the time of the conveyance, of which plaintiff made no offer of proof, he was only entitled to a return of the consideration paid by him, the cancellation of the bond and mortgage given in part payment of the purchase price, and $100 for liquidated damages, besides any sum paid by him for taxes on the property, as well as installments paid on account of the principal of the mortgage and interest payments, together with interest on said several amounts less the rental value of the property — seventy-five dollars per month — during the time of his occupancy. That the sums so payable to plaintiff be decreed to be liens upon the property in question, and that it may be sold to pay the same. Brazill v. Weed, 546.

See **Contracts; Encroachments; Specific Performance; Trespass; Vendor and Purchaser.**

REPLEVIN.
Infancy is not a defense to an action in replevin to recover an engagement ring given by plaintiff to defendant. Benedict v. Flannery, 627.

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SALES.

1. *What insufficient to pass the property in the goods — Actions — Contracts — Trial — Evidence — Damages — Personal Property Law*, §§ 100, *rule* 4(1), 145(3).— Rule 4(1) of the rules declared by section 100 of the Personal Property Law for ascertaining the intention of the parties as to when the property in goods is to pass to the buyer, unless a different intention appears, provides that "where there is a contract to sell unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made." *Held*, that unless an appropriation to the contract of goods, delivery of which was tendered by the seller after manufacture, was made with the buyer's assent express or implied, such appropriation is insufficient to pass the property in the goods. A complaint set forth two causes of action, one for the purchase price of goods sold and the other for damages for defendants' breach of contract in cancelling and refusing to be bound thereby. Upon the trial, by the court without a jury, it appeared that after defendants had ordered from plaintiff certain coats of two designated style numbers designed and manufactured by plaintiff, a number of the coats of the first style were delivered to defendants who though they accepted and paid for the goods refused a subsequent tender of the remaining coats of that style and without reason cancelled the order for the goods of the other style after a few of the coats of said style had been delivered, accepted and paid for. When the order for the goods was cancelled they were all in the course of manufacture. After they were completed, a few days after the order of cancellation they were sold in the open market and the evidence tended to show that at the time of the sale, the market price had dropped twenty-five to forty per cent since the contract was made. The plaintiff was given judgment for the full contract price of the goods tendered and for the difference between the contract price and that for which the goods were sold in the open market, fixed by the court as the market price of the goods of the style numbers which the defendants had cancelled. Upon reversing the judgment and ordering a new trial, *held*, that the plaintiff's sole right of action, on the record as it stood, under the first cause of action alleged, was one for damages for non-acceptance of the goods and that the measure of damages was controlled by section 145(3) of the Personal Property Law. The trial judge as to the second cause of action, which was based on an anticipatory breach of contract, correctly applied the rule of damages which he should have applied upon defendants' refusal to accept and pay for the goods described in the contract constituting the subject-matter of the first cause of action. Funt v. Schiffman, 155.

2. *Goods to be manufactured — Delivery in installments — Whether contract divisible question for jury — Personal Property Law*, §§ 125(3), 126(2), 156.— Where upon a sale of seventy-five pieces of goods to be manufactured the purchaser accepts delivery of fifty-nine pieces and rejects the remainder as defective and

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SALES — Continued.
returns them to the seller who accepts such return and issues its credit memoranda therefor, the dismissal of the complaint in an action to recover damages alleged to have been sustained by reason of the seller's refusal to replace the defective pieces at the contract price, is error for which the judgment entered upon the dismissal of the complaint will be reversed and a new trial granted. Under the Personal Property Law (§§ 125(3), 126(2) and 156) a jury would have the right to determine whether the contract was divisible and to fix the damages sustained by reason of the delivery of the defective goods. Rosing v. Parkside Mills, Inc., 624.

SEAMEN.
See **Municipal Court of City of New York.**

SHIPS AND SHIPPING.
Negligence—Charter-party—Evidence—Damages—Trial.— While defendant was in possession of plaintiff's scow without motive power under a charter-party which included the services of a so-called "captain" whose duty it was to take care of the scow, it was towed in calm weather to a dock and moored alongside of a steamship for unloading. On the night of the next day the dock was exposed to the full sweep of a northwest storm which developed into a hurricane and as a result the scow was injured. *Held,* that evidence that the weather bureau had issued storm warnings some hours before the full strength of the hurricane developed, justified an inference that defendant, which rested at the close of plaintiff's case, was negligent in permitting the scow to remain in the position where necessarily it would be exposed to the full force of the storm, and that plaintiff was entitled to recover for all damage to the scow caused by such negligence. Without deciding now, whether there was evidence tending to show that the captain was in fact negligent in any respect, an instruction repeated in effect several times that they could find for the defendant only if they believed that the accident was caused by the negligence of the captain while in control of the defendant, was prejudicial error for which a judgment in favor of plaintiff will be reversed and a new trial ordered. Rice v. McAllister Lighterage Line, Inc., 166.

SPECIFIC PERFORMANCE.
1. *Action to compel—Title—When plaintiff entitled to judgment.* — In an action to compel specific performance of a land contract, it appeared that the premises adjoining on the south, and on which the premises in suit encroached eight and one-half inches, had been used for over a hundred and twenty years as an open alleyway and drive, and that the purchasers of the lots bounding thereon and their grantees have an easement therein. It further appeared that, although prior to 1893 the alley was not assessed by the city of New York, it was taxed from that year to 1915, when the assessment thereof ceased, and though it was sold several times for unpaid taxes no action to foreclose the tax liens had been brought. *Held,* that the purchaser at either of the tax sales took the title burdened with the easement of the purchasers of the lots adjoining the alley and that the encroachment complained of in no sense makes the title

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SPECIFIC PERFORMANCE — Continued.
unmarketable, and plaintiff is entitled to judgment. Poetzsch v. Mayer, 422.

2. *If title is good at time of trial specific performance in certain cases will be decreed even if title defective at time of closing — When the giving of dower would upset the scheme of the will and the widow has received income from a trust fund in lieu of dower she is estopped from claiming dower — Wills.*— Where at the trial of an action brought by the purchaser to compel specific performance of a land contract of which time is not of the essence, the title to the property is good, the plaintiff may be required to specifically perform on his part even though the title was defective at the date of the closing of title, provided nothing has taken place in the meantime to his prejudice which would make performance on his part inequitable. A contract to convey certain real estate of a testator having been made by his executors, the intending purchaser, on the day of closing, rejected the title because of a certain judgment against the executors which had been assigned and an alleged dower right of the widow of a former owner of the premises, but the purchaser offered to execute and deliver the purchase money bond and mortgage called for by the contract and tendered a cash payment thereunder, on condition that the executors give a conveyance clear of the objections made to the title. *Held,* that the reception in evidence, on the trial of an action to compel specific performance brought by the purchaser, of an instrument in writing purporting to release the premises in question from the lien of said judgment, duly recorded and properly indexed, cured the objection to the judgment, and that the defendant executors, who also asked for specific performance, were entitled thereto, it not appearing that such course would tend to make it inequitable to the plaintiff. It appearing that to give dower to the widow of the former owner of the property would necessarily upset the scheme of his will, by which he intended she should have no dower, and would keep from the testamentary trustees, who were vested with the title to the entire estate with full power of sale, a portion thereof, and the widow, having for a number of years elected in lieu of dower to receive the income of trust funds into which the proceeds of a sale of real estate by the said trustees had passed, she would be estopped to set up a claim of dower in the premises in question. Loria, Inc., v. Stanton Co., 640.

See **Contracts; Landlord and Tenant; Vendor and Purchaser.**

STATUTE OF FRAUDS.
See **Contracts; Partnership.**

STATUTES.
1. *Laws of* 1920, *chap.* 942.— The provision of chapter 942 of the Laws of 1920, in effect September 27, 1920, that no proceeding under section 2231(1) of the Code of Civil Procedure "shall be maintainable" except under certain circumstances therein specified, was not intended to be retroactive in the sense that it should apply to pending proceedings. Nothing in said statute of 1920 indicates that the legislature intended that the provision in regard to pending pro-

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STATUTES — Continued.
ceedings should apply only to those in which a final judgment had already been entered. Levy v. Baum, 201.

2. *Construction of — Power of board of supervisors to increase salaries of county officers — County Law,* § 12(5) — *Laws of* 1913, *chap.* 293.— The legislature having failed to except from the county officers whose salaries are to be fixed by the board of supervisors under the broad conditions of section 12(5) of the County Law notwithstanding any general or special law, the office of commissioner of charities and corrections of Erie county, created by chapter 293 of the Laws of 1913 and the salary fixed thereby, it must be held that it was the legislative intent that the power to increase such salaries should remain and be exercised by the board of supervisors in its discretion, and where the manner of the exercise of such power has been lawful, the complaint in a taxpayer's action to restrain the payment of the salary will be dismissed. Wende v. Board of Supervisors, 250.

3. *Interpretation — Power of public service commission to fix telephone rates — Injunctions — Public Service Commissions Law,* §§ 23, 92, 97.— The Public Service Commissions Law neither confers power upon the public service commission nor imposes the duty upon it to fix the rates which shall be charged in all cases for telephone service. Under section 97 of the Public Service Commissions Law the commission has the legal power not only to make orders fixing maximum rates for telephone service but to abrogate such orders and consent to an increase of rates. Under the Public Service Commissions Law the commission, aside from the power delegated to it by the legislature to fix maximum rates for telephone service, has power to consent to an increase of rates without determining what rates are reasonable and should thereafter be observed as maximum rates, when it appears that the conditions which prevailed when the earlier order was made have materially changed. The right of the public service commission to consent to an increase in a rate previously fixed is not subject to any limitation that it shall be given only after a complete hearing sufficient to enable the commission to determine the just and reasonable rates to be charged thereafter. An order of the public service commission fixing the maximum charges for telephone service is an attempt to predict for the future the charges that will yield a fair return, and so long as the Public Service Commissions Law contains no provision that the commission may not abrogate an order made by it fixing maximum rates for telephone service or consent to an increase except as part of an order fixing new rates, the commission, pending the hearing and determination of an application for an increase in rates, may consent that the rates fixed and determined by its previous order be increased by "certain additional percentages." Subject to the common law rule that no public service corporation may charge more than a reasonable rate for service, a telephone company may at will change its rates for telephone service only by filing schedules in accordance with section 92 of the Public Service Commissions Law, unless or until the public service commission has by an order fixed the maximum rates for such service in accordance with said section of the statute. By virtue of section 23 of the Public Service

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STATUTES — Continued.
Commissions Law such an order remains in force only until "changed or abrogated by the commission," and when such order is abrogated the right of the telephone company to increase its rates by filing schedules is exactly the same as before the original order was made. City of New York v. New York Tel. Co., 262.

4. *How far Eighteenth Amendment to the Constitution of the United States and the Volstead Act abrogate state statutes — Habeas corpus — Laws of* 1920, *chap.* 911.— The Eighteenth Amendment to the Constitution of the United States and the Volstead Act do not abrogate previously existing state statutes relative to trafficking in liquor, except in so far as they may be in open and direct conflict with the federal statutes. All provisions of state laws which tend fairly to the enforcement of said amendment and are not in direct conflict with the Volstead Act, remain unimpaired and may be enforced by the state courts. The statute (Laws of 1920, chap. 911) relating to trafficking in "all distilled and rectified spirits, wine, fermented and malt liquors containing at least one-half of one per centum of alcohol by weight," though not altogether in harmony with the so-called Volstead Act, is void only in so far as it conflicts with the federal statutes. All those provisions constituting the greater portion of said statute of 1920 and which authorize the granting of a liquor tax certificate for the sale of liquor containing more than one-half of one per cent of alcohol and not more than two and seventy-five hundredths per cent, violate the Federal Constitution, and any liquor tax certificates issued thereunder are void. Where certain declarations within the body of said statute of 1920 show a legislative intent to give effect to the Eighteenth Amendment of the Federal Constitution and to absolutely prohibit the sale for beverage purposes of liquor deemed intoxicating, the court is justified in inferring that such was the dominating intent of the legislature; that the provisions authorizing the sale of liquors containing not more than two and seventy-five hundredths per cent of alcohol were subsidiary to the main purpose of the statute, so that even with the unconstitutional provisions exscinded, the legislature would still have passed the act. Section 8 of said statute of 1920 which though providing for excise taxes on trafficking in liquors makes no provision for the sale of liquor to be drunk on the premises except, in a city of the first or second class, in a restaurant where meals are furnished. *Held,* that as no license could legally be obtained under the statutes to sell, in such a place, liquor of any degree of alcoholic content, said section was separable from and independent of the statutory purpose to permit, under certain restrictions, the sale of so-called non-intoxicating liquors containing up to two and seventy-five one-hundredths per cent of alcohol. An information charging relator with a violation of the statutes of 1920 is not defective because the alcoholic content of the whiskey alleged to have been sold by him was not set forth and upon a traverse to the return to a writ of habeas corpus sued out by relator pending a hearing upon the information before a magistrate he will be remanded. People ex rel. Thomsen v. Comr. of Correction, 331.

See Tables Consolidated Laws and Session Laws cited, ante, pp. xliii, xliv; Injunctions; Landlord and Tenant; Municipal Court of the City of New York.

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STOCKBROKERS.

1. *Selling out under the rules — Damages.*— On a Saturday, the day after a sale of certain securities by plaintiffs, members of the New York Stock Exchange, to defendants, who are not, a confirmation of the sale was received from defendants, at the foot of which appeared the following: "All transactions involving the purchase or sale of securities are made by us subject to the rules and customs of the Exchange and with the distinct understanding that actual delivery is to be made." Defendants requested plaintiffs, as matter of accommodation, to deliver the securities to a certain trust company. No delivery was made on the following Monday or on the next day, which was a holiday, and when on Wednesday the securities were tendered to the trust company they were refused, and, upon being sold out for defendants' account, in accordance with the rules of the stock exchange, there was a loss to plaintiffs. The relevant rule of the Exchange was to the effect that when a delivery is not made in time, the purchaser may not take advantage of the seller's default until after giving notice of intention to "close the contract," which notice it was conceded had not been given by defendants. *Held,* that in an action for defendants' failure to accept the securities, plaintiffs were entitled to judgment for the difference in the market value of the securities. A contention of defendants that a previous decision of this court in which it was held that in an action in which the defendants herein sued the trust company upon a corresponding liability with that sought to be enforced in the present case, the notice at the foot of defendants' confirmation of the sale, regarding the applicability of the rules of the Stock Exchange, was not a part of the contract between the parties to that suit, was controlling in the present action, was untenable, and a judgment directed in favor of defendants in the present action will be reversed with costs, and judgment directed for plaintiffs in the full amount claimed, with costs in the court below. Shuman v. Goldsmith, 327.

2. *Misappropriation of stock certificate by an executrix — Right of legatee to maintain action against broker for the recovery of stock pledged as collateral by executrix — Executors and administrators.*— Testator, who at his death was the owner and holder of three certificates of corporate stock for fifteen, sixty and one hundred and fifty shares respectively, bequeathed twenty-five shares to his father and twenty-five shares to his mother. One-half of the residue of his estate he gave to his wife with direction that the other half should be held by her in trust until his oldest child should have attained the age of twenty-one years, and that each of his children should receive a proportionate share in said one-half of such residuary estate upon arriving at a like age. About fifteen months after the death of testator his widow, the sole trustee and executrix of his estate, deposited the certificate for one hundred and fifty shares of stock with the defendant firm of stockbrokers to sell, with instructions to purchase other stock for her individual account, and to hold the stock deposited until sold as margin upon her individual purchase, and when sold, to apply the proceeds upon her own purchase of stock. The one hundred and fifty shares of stock deposited were never sold, but are now held as collateral by the stockbrokers who claim a lien thereon, to secure them for the considerable loss which the widow sustained in her purchase of stock through them.

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STOCKBROKERS — Continued.
In an action against the firm of stockbrokers and the widow as executrix brought by the only child of testator, now of age and entitled to receive one-half of the residuary estate of his father, asking for a construction of the will and that the defendant stockbrokers be ordered to deliver to the executrix possession of the stock certificate deposited with them by her, *held,* that the delivery of said stock certificate for the personal use of the executrix was a misappropriation thereof, except in so far as she may have been entitled to receive a portion of the same as residuary legatee. When the defendant stockbrokers accepted the stock deposited by the executrix as collateral for her individual account, with the knowledge that the stock certificate was part of the estate of her deceased husband, they joined in such conversion and are answerable therefor as trustee *ex maleficio.* The plaintiff, while not legally owner of the whole fund, has a right to compel the executrix to pay to him the portion thereof to which he is entitled, and such rights having been impaired by the wrongful action of the executrix and the other defendant, plaintiff may appeal to a court of equity to right the wrong and under the authority of *Van Camp* v. *Fowler,* 59 Hun, 311, the court has jurisdiction to give complete relief and determine the title to the fund in dispute. Bailie v. Sheldon, **441.**

STRIKES.
See **Injunctions.**

SUMMARY PROCEEDINGS.
1. *Monthly tenancy — When pleading of notice unnecessary — Laws of* 1882, *chap.* 203, *as amended by Laws of* 1920, *chap.* 209.— A statute requiring a landlord to give notice of his intention to terminate a tenancy has no application where the tenancy is terminated by the act of the tenant. Where a petition in summary proceedings against a monthly tenant holding over without the permission of his landlord alleges that the tenant, about the end of a certain month, notified petitioner that he would quit and surrender the premises, located in the city of New York, on the first day of the succeeding month, the dismissal of the petition for failure to allege that the landlord had given the tenant the notice required by chapter 203 of the Laws of 1882, as amended by chapter 209 of the Laws of 1920, is error, and the final order entered thereon in favor of the tenant will be reversed and a new trial ordered. A. N. P. Realty Co., Inc., v. Tunick, 190.

2. *When tenant not debarred from pleading defense that rent is unreasonable — Laws of* 1920, *chaps.* 944, 945.— While the payment of the first month's rent of premises in the city of New York, several months after the lease was made, constitutes a ratification thereof which prevents the tenant from claiming that he executed the lease under duress, he is not, in a summary proceeding for non-payment of rent, debarred from pleading under the statute (Laws of 1920, chaps. 944, 945) the defense that the rent demanded is unreasonable and oppressive. By pleading such defense the tenant neither disaffirms his contract nor is he obliged to relinquish the benefits

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SUMMARY PROCEEDINGS — Continued.
received thereunder, and a failure to claim the right granted to him by the statute, to continue in possession of the premises upon the payment of a reasonable rent, is not waived by his failure to avail himself of such right at the first opportunity. B. & S. Realty Corporation v. Wald, 195.

3. *When motion directing clerk of the court to deliver warrant denied — Landlord and tenant — Pending proceeding — Statutes — Laws of* 1920, *chap.* 942.— Until the warrant in a summary proceeding is actually issued, the proceeding is pending within the meaning of chapter 942 of the Laws of 1920, even though a final order has been entered in the proceeding. Where a tenant obtained the right to continue in possession of the premises after September 8, 1920, solely because of a stipulation made in a summary proceeding to leave the premises peaceably on September 30, 1920, the landlord consented to stay the execution of the final order and the court granted a stay until September 30, 1920, and the tenant, relying upon the provisions of chapter 942 of the Laws of 1920, in effect September 27, 1920, refuses to give up possession on the thirtieth, a motion for an order directing the clerk of the court to deliver to the landlord the warrant in the summary proceeding as of September 8, 1920, was properly denied, as until the warrant actually issued the summary proceedings are pending. Tauszig v. Kantor, 366.

4. *When final order in, reversed — Statutes — Co-operative corporations — Landlord and tenant — Attornment — Laws of* 1920, *chap.* 942.— The co-operative plan of holding property to be used for dwelling purposes, authorized by chapter 942 of the Laws of 1920, must cover the entire building. Where in a proceeding under said statute to recover possession of an apartment in a building in the city of New York alleged to be owned by a corporation under the co-operative plan authorized by said statute, it appears that the alleged corporation is merely a substitute to evade the statute; that there are two vacant apartments; that several are held under plural ownership; that one was rented without lease or stock as required by the statute; that persons and an outside corporation owning more than one apartment clearly do not want them for their own use but for speculation, and that the petitioner is simply a stockholder in the alleged co-operative corporation claiming to attorn to it for rent collected, a final order in the summary proceeding awarding him possession of the premises will be reversed with costs, and the petition dismissed on the ground that it was established that there was not such "good faith" in the sale of the property to the corporation as the statute requires. Ravitz v. Simetz, 406.

5. *When tenant waives right to object to defects in proceedings — Jurisdiction — Landlord and tenant — Code Civ. Pro.* § 2231(1*a*). — The technical rules that once were in vogue in summary proceedings should no longer prevail. The amendment (Laws of 1920, chap. 942) to section 2231 of the Code of Civil Procedure consists of the insertion of a new subdivision, 1a, which provides "No proceeding as prescribed in subdivision 1 of this section shall be main-

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SUMMARY PROCEEDINGS — Continued.
tainable to recover the possession of real property * * * occupied for dwelling purposes except * * * or a proceeding where the owner of record of the building being a natural person seeks in good faith to recover possession of the same * * * for the immediate and personal occupancy by himself and his family as a dwelling." *Held,* that in a summary proceeding against a tenant holding over based upon the claim that one of the landlords wished the property for his own residence, it was not necessary that the petition should allege either that the landlord is a "natural person" or the "owner of record" of the property. The court having general jurisdiction of the subject matter the failure to allege any fact essential to give jurisdiction of the person might be waived by the tenant. Where the tenant made no mention of the alleged defect in the petition until after the trial had closed and then not until it was pointed out by the court and the landlord's deed showing that he was the owner of record of the property was received in evidence without objection, the landlord's right to maintain the proceeding was fully established and the tenant's right to object to the petition as defective was waived. Kaplan v. Bernstein, 413.

6. *Non-payment of rent — When court has power to adjudicate reasonable amount of rent — Landlord and tenant — Statutes — Code Civ. Pro.* §§ 2231, 2244.— Where the petition in a summary proceeding under section 2231 of the Code of Civil Procedure as amended by chapter 945 of the Laws of 1920, for non-payment of rent, alleges that the rent involved is no greater than the amount for which the tenant was liable for the month next preceding his default, and the tenant pleads that the rent demanded is unjust and unreasonable and that the agreement, therefore, is oppressive, the court, upon findings that such rent is excessive, has power under section 2244 of the Code of Civil Procedure, as amended by chapter 137 of the Laws of 1920, to adjudicate what is the reasonable amount of rent. Needelman v. Levine, 419.

7. *Landlord and tenant — Improving existing building is not "demolishing the same with the intention of constructing a new building" — Laws of* 1920, *chap.* 942.— The plans and specifications for changes in a seven-story corner apartment house in the city of New York were designed to convert it into a building to provide for twenty-five families, and, in substance, the physical changes consisted in the removal of a great many partitions, the installation of two new bathrooms and toilets on each floor, the introduction of new dumbwaiter shafts and new plumbing throughout the building and the erection of an additional fire escape, but no interference was contemplated with the foundations, walls, roofs or floors. *Held,* that there was no intention to demolish the building for the purpose of erecting a new one, within the meaning of chapter 942 of the Laws of 1920, and a final order in favor of the landlord in summary proceedings will be reversed and the petition dismissed. Rosman Realty Corporation v. Quinn, 510.

See **Landlord and Tenant; Municipal Court of the City of New York.**

SUPREME COURT.
See **Criminal Procedure; Jurisdiction.**

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SURROGATES' COURTS.

Jurisdiction in the accounting of an administrator of testamentary trustee who died without the county in which will was probated.— The Surrogate's Court of the county where a resident's will was admitted to probate has exclusive jurisdiction of a proceeding for the judicial settlement of the accounts of the administrator of the testamentary trustee who died in another county, where the letters of administration were granted. Matter of Edgar B. Pinckney, 602.

See **Discovery.**

TAXES.

1. *Taxation — Jurisdiction of commissioner of taxes, etc., in New York city — Assessment of property of manufacturing corporation — When objection to form of complaint and procedure deemed waived — Owner of property is "party aggrieved" within section* 290 *of the Tax Law and section* 906 *of Greater New York charter, though tenant bound to pay taxes — Certiorari — Review of assessment for overvaluation — Boilers, generators, etc., in buildings assessable as real estate — Tax Law,* §§ 37, 219-*j*, 219-*l* — *Greater New York charter,* § 895 — *Assessment reduced.*— All that is necessary to the exercise of jurisdiction by the commissioner of taxes and assessments of the city of New York to hear and determine a complaint in relation to an assessment upon property under section 895 of the Greater New York charter is, that within the statutory time limit a complaint in writing stating the grounds of objection to the assessment be presented to the commissioner. The form of the complaint, the particularity with which the property shall be described or the objections specified, are mere matters of procedure and do not go to the jurisdiction. The rule that technical objections to the form or sufficiency of pleading are waived if not taken in advance by proceeding to a hearing upon the merits, applies to proceedings before said tax commissioner to have an assessment revised. Where the application for the revision of such an assessment meets all the requirements of section 37 of the Tax Law and of section 895 of the Greater New York charter and is referred to a deputy tax commissioner for reexamination, and the hearing upon the merits is had without objection at any time being made to the form or sufficiency of the application, a reassessment may not be denied on the sole ground that the application was insufficient; the objections are deemed to have been waived. The legislature in retaining by section 290 of the Tax Law and section 906 of the Greater New York charter the statutory remedies heretofore provided for the revision and correction of assessments by a writ of certiorari, did not intend to exclude from its benefits an owner of property whose tenant by its lease was obligated to and did pay the taxes assessed against the property, and relator, the owner of the property in question here, is clearly a "party aggrieved" within section 290 of the Tax Law and section 906 of the Greater New York charter and entitled to maintain certiorari proceedings to review and correct an assessment against its property. The relator, a domestic manufacturing and mercantile corporation, is the owner of a plot of land in the city of New York, having a frontage of 250 feet on each of two streets and a depth of 200 feet, upon which there are a four-story freezing house, a four-story engine building and a six-story boiler house. In the total assessment of $400,000

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TAXES — Continued.
upon the real estate in question for each of the years 1918, 1919 and 1920, there was included the alleged value of machinery and equipment in the buildings amounting to $133,000, which relator, on certiorari to review the assessment as erroneous for overvaluation, claimed was personal property and exempt from taxation under sections 219-j and 219-l of article 9-A of the Tax Law, and that the true valuation of the real estate was $267,000, which claims were denied by the return to the writ of certiorari. *Held,* that relator having by a preponderance of proof overcome the presumption that the machinery and equipment could not be removed without material injury to the buildings, a finding that all such machinery and equipment, with the exception of boilers, generators and main shafting, were so removable and not essential to the support of the buildings, is justified, and the conclusion follows, that all the machinery and equipment included in the machinery assessment, except as above stated, was personal property, not assessable as real estate, and therefore exempt from local taxation during the years in question. A contention of the relator that under section 219-l of the Tax Law as it stood when it was amended in 1919, only two of the six boilers used for the purpose of operating an ice-plant are taxable, because two is the maximum number which would be required to operate machinery in an ordinary building of the same size as relator's, is untenable. Within the purview of said statute, which exempts boilers from the exemption therein provided, all six boilers are an integral part of the building and so long as they remain therein are assessable as real estate. The actual market value on the taxable status dates of all the boilers as well as of the generators, main shafting and pulleys, concededly taxable, amounting in the aggregate to $36,105, as found by the court, must be deducted from the actual market value of the machinery and equipment included in the machinery assessment of $133,000, as of the several taxable status dates, and added to the building assessment. The relator having fully established all the prerequisites necessary for a correction of the assessments and the court having found that on the several taxable status dates the actual market value of the land was $80,000 and the actual market value of the buildings was $187,000, to which should be added $36,105, deducted from the actual market value of the machinery and equipment on said dates it is accordingly *held,* that there was an overvaluation in each of the years in question, to the extent of $96,895, and the several assessments will be reduced to the sum of $303,105. People ex rel. Ruppert Realty Corp. v. Cantor, 519.

See **Transfer Tax.**

2. *A tax voluntarily paid to the person authorized to receive it under a mistake of law without coercion or duress cannot be recovered.* Brotherhood Wine Co. v. State of New York, 682.

See **Transfer Tax.**

TELEGRAPHS AND TELEPHONES.

Telegraph company cannot relieve itself from the consequences of its wilful misconduct or gross negligence — Liability for non-delivery of message — Measure of damages.— A telegraph company is responsible for its neglect to perform its duties to one to whom

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TELEGRAPHS AND TELEPHONES — Continued.
a telegram is addressed as well as to the sender, and a stipulated limitation of liability binds both. While a telegraph company is liable for any neglect to exercise due care in the correct and prompt transmission of messages, it may by contract limit its liability for mistakes or delay in the transmission of messages, but the general rule, irrespective of such a contract, is, that the company cannot in such manner relieve itself from the consequences of its wilful misconduct or gross negligence. Where a telegraph company never sent a cable message delivered to it for transmission, and the failure to deliver is not shown to have been due to mistake in transcribing or difficulty is transmitting, the company is guilty of gross negligence and is not relieved by limited liability stipulations nor does a stipulation relating to the time for presentation of notice of claim exempt it from liability. In an action for damages for failure to transmit a cable message, brought by the addressee, it appears that a few days after the sender of the message had cabled from South America to plaintiffs in New York city an inquiry as to the price of brass tubes of a specified length and width, he sent to plaintiffs the cable forming the basis of the present suit, from which it plainly appears that the length and width of the tubes ordered were different from those contained in plaintiffs' offer. *Held*, that while the message could not be held to be an unqualified acceptance of plaintiffs' offer, it was at least a definite offer by the sender to plaintiffs contingent upon their acceptance, and that the addressee was entitled to show whether he would have accepted the offer, and that upon such testimony it became a question of fact whether he would have accepted it or not. This question of fact having been resolved in favor of plaintiffs they were entitled to judgment for the difference between the market price and the contract price. Freschen v. Western Union Telegraph Co., 289.

TRANSFER TAX.
1. *Appraisal — When accrued interest on investments should not be included in valuation — Tax Law*, § 221-*b*.— In fixing under section 221-b of the Tax Law, the additional tax of five per cent on investments left by a decedent who died in May, 1919, it is improper to include in the valuation, the accrued interest on the investments to the date of decedent's death. The system of transfer tax appraisers in reporting valuations, to include the market value of investments plus interest, is one of convenience only, and cannot be used to sustain a transfer tax under section 221-b of the Tax Law. Matter of William H. Yawkey, 237.

2. *Vested remainders under trust deed — Life tenant assumed to survive trust period — Exemptions — Tax Law*, § 221-a.— Decedent died intestate leaving a son and daughter as her only heirs-at-law and next of kin. Under a trust deed of decedent a remainder was to vest when said son attained the age of twenty-five years, or upon his previous decease. At the time of the transfer tax appraisal the son was seventeen years of age. The order fixing the tax assumed that the son had reached the age of twenty-five years and considered the remainder as vested as of the date of the appraisal in the son and daughter, thereby taxing the transfer of the various

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TRANSFER TAX — Continued.
funds at the minimum rate against each equally. *Held,* that the tax was properly made and the appeal of the comptroller is overruled. Independently of the amounts received by the beneficiaries as of the date of the death of decedent, the transfers deemed to have been effective and complete as of the date of the trust deed were properly subject to a transfer tax, and under the then existing statute were entitled to an exemption of $5,000. Under the amendment to section 221-a of the Tax Law by chapter 664 of the Laws of 1915, the combined transfers to each beneficiary, effective at the date of decedent's death, were entitled to but a single exemption of $5,000. Matter of Augusta L. Cummings, 276.

3. *Joint ownership of securities — Whole value taxed — Tax Law,* § 220.— Where prior to May 20, 1915, certain of the securities then owned jointly by decedent and his wife were sold and the proceeds invested in other stock and bonds which were at his death in a joint account opened by them with a brokerage firm in 1910, the transfer of securities by his death on July 20, 1919, was not of property owned prior to the amendment to section 220 of the Tax Law by chapter 664 of the Laws of 1915, and the transfer tax was correctly imposed upon the whole value of said securities. Matter of Louis D. Kelley, 357.

4. *Irrevocable trust deed — Vested remainders.*— An irrevocable trust deed executed by decedent provided that during her life the entire income from the trust estate should be paid to her four children in equal shares and in the event of the death of one of them, leaving issue, the income was to be paid to such issue, but if none, then to the surviving children. Upon the death of the grantor three-fourths of the property was to be distributed among her daughters or the issue of deceased daughters, and the income from the remaining one-fourth was to be paid to the son of testatrix for life, with remainder to the daughters or their issue. *Held,* that under the trust deed the daughters took a vested remainder in three-fourths of the trust estate, which, however, they could not possess or enjoy until after the death of their mother. The death of the mother making no difference in her son's enjoyment of the remaining one-fourth of the property passing by the trust deed, the transfer to him thereunder was not subject to a transfer tax, but the transfer to the daughters was properly taxable as of the date of the death of decedent. Matter of Amelia N. Dunlap, 580.

5. *Shares of stock — Boston & Albany railroad — Fitchburg railroad — Tax Law,* § 220. Matter of Caroline S. Greene, 704.

6. *Deed of trust — Securities under control of trustee are not "held by the decedent" — Tax Law,* § 221-*b*. Matter of John M. Bowers, 705.

7. *When previous order fixing tax is not res adjudicata — Reversionary interests.* Matter of Mary Carey, 732.

8. *Money paid pursuant to compromise agreement between distributees and claimant not deductible.* Matter of James Supple, 735.

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TRANSFER TAX — Continued.
9. *Bequest to a city without the state for a free and public hospital not taxable.* Matter of Andreas M. Miller, 736.
See **Executors and Administrators.**

TRANSIT COMMISSION.
See **Injunctions.**

TRESPASS.
When action against tenant for, will not lie — Landlord and tenant — Bill of particulars.— Under the so-called Emergency Rent Laws of 1920, a landlord cannot, by bringing an action in trespass instead of for rent deprive his tenant of the right to a bill of particulars and of the other special protection given him under said laws. Where the landlord in an action in trespass against a tenant who did not remove from the premises on September 30, 1920, the end of his term, establishes the status of the defendant as a statutory tenant who cannot be dispossessed so long as he is ready to pay a reasonable rent, a judgment in favor of plaintiff for the rent at the old rate will be affirmed, although a denial of a motion to dismiss the complaint, on the ground that the action would not lie under the new rent laws, was error. Paterno Realty Co. v. Hattenbach, 400.

TRUST.
See **Interest.**

UNITED STATES CONSTITUTION.
See **Landlord and Tenant; Statutes.**

VENDOR AND PURCHASER.
1. *Contracts — False representation as to ownership and location of lots — Fraud — Trial.*— Contributory negligence is no defense to an action for fraud. After negotiating with defendant for the purchase of two certain lots not owned by it and which were stated to be about one hundred and seventy-five feet away from a certain named avenue, plaintiffs, who were ignorant of the English language, executed a contract prepared by defendant for the purchase of two lots other than those agreed upon on the same street which were not located one hundred and seventy-five feet from said avenue. Subsequently plaintiffs, in reliance upon defendant's false representations as to the ownership and location of the lots negotiated for and that there was gas and a sewer in the street, erected a building upon said lots. In an action for fraud, *held,* that a charge to the jury that the false representation that there was a sewer and gas in the street was waived by plaintiffs because not mentioned in the contract of sale, was erroneous. A holding of the trial judge that plaintiffs before erecting the building should have examined their contract and the map therein referred to, was also erroneous, as the plaintiffs had a right to assume that the defendant would incorporate into the contract the actual agreement of the parties. Assuming that plaintiffs were careless or negligent in not reading the contract and having the property surveyed or located before attempting to build thereon, this would not protect defendant from

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VENDOR AND PURCHASER — Continued.
its wilful fraudulent acts. Judgment dismissing the complaint entered upon an order setting aside the verdict of the jury in plaintiffs' favor reversed and new trial ordered. Vihart v. Broadway Development Corporation, 410.

2. *When title by adverse possession good — Non-resident aliens incapable of inheriting real estate previous to the statute of* 1874.— Where upon the trial of an action for damages because of defendant's failure to perform his contract to convey, it clearly appears that his continued possession and occupancy of the premises in question since 1871 to date has been open, notorious and undisputed, it must be held that he not only has a good and valid title by adverse possession but also through a valid chain of title, and when, upon the day set for the closing of title, he tendered a deed which plaintiff refused to accept on the ground that the title was unmarketable, the defendant is entitled to judgment dismissing the complaint. The statute permitting a non-resident alien to inherit not having been enacted until 1874, it could not and did not affect the vested rights of the heirs of a tenant in common of the property, who obtained title by his death in 1871. Rossi v. Gentile, 636.

3. *Title — When encroachments do not make title unmarketable — Tax sales — Easements.*— The fact that the walls of a building which encroaches upon adjoining premises may remain undisturbed so long as the building, which had been erected over fifty years stands, does not make the title unmarketable. An exception to taking title arising to a great extent from the difference of opinion of surveyors as to the location of ancient monuments, is of minor importance and in no way affects the marketability of the title to premises located in the older sections of the city of New York. Tax sales invest the purchaser with only that title which the owner of the property had and the owner of an easement therein which was lawfully acquired prior to the levying of the tax under which the tax sales were made, is not divested of his property right in the easement. Poetzsch v. Mayer, 422.

See **Contracts.**

WILLS.

1. *Construction of holographic codicil — Probate — Statute of Wills — Witnesses — Verification.*— A will having been admitted to probate and two holographic codicils thereto denied probate for non-compliance with the Statute of Wills, a third holographic codicil written upon both sides of a one-sheet letter head was offered for probate. On the front page of said codicil the testator commencing "Add to my will" made testamentary dispositions of property, and at the bottom of the page wrote "N. Y. July 13, 1917." On the back of the said paper and addressed "To the Surrogate of the City of N. Y. and my trustee" he expressed his desire, as stated on the other side of the paper, signed his name, and dated the paper February 13, 1919. To the left of his signature were those of two witnesses and below, a verification before a notary public on March 14, 1919. *Held,* that "N. Y. July 13, 1917" and certain words on the back of the paper, as well as the verification, should be stricken out, and February 13, 1919, taken as the date of execution, and as

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WILLS — Continued.
so construed the codicil will be admitted to probate. **Matter of Charles Sidenberg, 38.**

2. *Construction of — Bequest to employee — When employment need not be continuous to come within terms of the will — Evidence — Opening of decree settling accounts of executor.*— A will is ambiguous only when it is judicially determined that no interpretation can be given to the instrument. There is no latent ambiguity in a bequest of money to each of such persons who have been in the employ of a certain named corporation "for fifteen years or more and less than eighteen years" upon condition that each of them shall be at the time of the death of the testator in his employ or that of the corporation, and parol evidence is inadmissible to show that it was the intention of the testator to confine his bounty to continuously employed persons, and one who when testator died had been thus employed, during two intervening periods, slightly less than eighteen years, is a legatee under said provision of the will, and entitled to take. The application of said legatee to open, set aside and vacate decrees entered upon the settlement of the accounts of the executor of the estate, granted on the ground that petitioner not having been cited to attend such accountings, the decrees entered thereon were as to him void. Matter of Benjamin Altman, 476.

3. *Holographic — Construction of — When bequest will not be cut down by a subsequent repugnant clause — Annuities — When devise held to be in fee simple absolute — Real Property Law,* § 153. — Testator by a will drawn by himself gave to his father and mother one-third in value of all the property of which he should die seized, any or all to be used or expended by them or the survivor of them as they should see fit, and in the event that both survived testator, so much of the property as should remain at the death of both his father and mother was devised and bequeathed to testator's wife. The rest, residue and remainder of the estate was given to testator's wife to use as she saw fit, and so much thereof as remained at her death was devised and bequeathed to testator's daughter and by a subsequent clause an annuity of $150 was directed to be paid to her until her marriage. *Held,* that under section 153 of the Real Property Law, which must govern, the devises of the real estate were in fee simple absolute. The absolute estate in the personalty given to testator's father and mother was not cut down by the subsequent repugnant clause following such gift, and similar considerations apply to the gift of the remainder of the estate to testator's wife. Placing the clause relating to the annuity before that of the gift to the wife of the remainder, substantial effect is given to the desire of the testator which was that his parents should receive one-third of the entire estate, that out of the balance the annuity should be provided and that his wife should receive the remaining balance. Matter of William C. Mead, 481.

4. *Construction of — Dower.*— Where a bequest of the income of two-thirds of the residuary estate for the benefit of testator's widow is declared to be in lieu of dower and the only change with respect to her, made by a codicil by which testator ratified and confirmed

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WILLS — Continued.
his will in every respect, so far as any part thereof was inconsistent with the codicil, was to add a further limitation to the widow's right to receive income, by providing that the same should be paid to her so long as she remained the widow of the testator, there is nothing inconsistent between the will and codicil with respect to dower. Matter of William H. Valentine, 574.

5. *Construction of — Residuary clause — Survival.*— The residuary clause of the will of testatrix, who left her surviving, two daughters and two sons, provided: "To my executors hereinafter named I give and bequeath and devise all the rest residue and remainder of my estate real and personal whatsoever and wheresoever. * * * And to apply the net income arising from all the rest of said residue and remainder of said proceeds to the use of my son Oscar during his natural life and the principal thereof to be equally divided among his children at and upon his decease, should he leave children surviving him, but in case of his death without leaving surviving him any children such last mentioned principal shall be divided equally among my other children Charles, Anna and Helen, if then living and if any of them shall then be dead the children of such deceased child shall together take the share to which their parent would have been entitled if living." Charles predeceased Oscar, without issue, and at the time of the latter's death both of the daughters were living. Upon the accounting the executrix of Charles claimed one-third of a fund to which testatrix became entitled under the will of her deceased husband. *Held*, that as to such fund, the testatrix did not die intestate, but that it passed under the residuary clause of her will and that the decree to be entered upon the accounting should provide for the equal distribution of said fund between the estates of her daughters. Matter of Helen E. Kelsey, 577.

6. *When legacy does not lapse.*— Where a legacy to each of the two nieces and the nephew of testatrix is followed by a gift over upon the death of either of them to their respective heirs, the heirs of the nephew, who died three days before the will was executed, are entitled to take the legacy. Matter of Amelia S. Bartlett, 582.

7. *Contested probate — Lack of testamentary capacity — Verdict sustained.*— Where testator at the age of seventy-five made his will and subscribed it by his mark, and upon a contested probate the evidence upon the single question submitted to the jury was conflicting and from which different inferences might fairly be drawn, a motion to set aside a verdict that the testator was of unsound mind on the date of the execution of the will will be denied where the testimony of the attending physician as to testator's delusions, irrational acts and mental incompetency at the time of the making of the will, is sufficient to sustain the verdict. Matter of Patrick Donohue, 586.

8. *Testamentary capacity — Verdict of jury that testatrix was of unsound mind and lacked testamentary capacity sustained.*—A competent testator must have strength and clearness of mind and

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WILLS — Continued.
memory sufficient to know in general, without prompting, the nature and extent of the property of which he is about to dispose, the nature of the act which he is about to perform, and the names and identity of the persons who are the proper objects of his bounty and his relation to them. Testatrix left her surviving as her sole next of kin a son forty-four years old, an incompetent, a victim of epilepsy since he was eleven years of age and who at present is an inmate of a State hospital. When she was about seventy-two years of age and suffering from cancer, Bright's disease, kidney trouble and fistula she was removed to a hospital in an exhausted condition where she died early the next morning. On the evening of the day before she went to the hospital she made a will by which she bequeathed all of her property, worth about $150,000, to strangers of the blood, to friends and to charities, and within twenty minutes thereafter became bluish. Upon the contested probate of the alleged will brought by the disinherited son, there was introduced in evidence a former will made by decedent about eighteen months before her death while apparently she was in good health, under the terms of which, after certain legacies to much the same persons mentioned in the instrument sought to be probated, the balance of the estate was given to charity. It was conceded, however, that under the former will, decedent died intestate as to about $30,000, which passed to her son because the gift to charity was in violation of section 17 of the Decedent Estate Law. The new alleged will, by language involved and complex, diverts from the son the interest he would take by force of the Statute of Distributions and by a method not calculated to be altogether clear until a final accounting, adds the $30,000 to legacies already given, by definite and fixed amounts, but by a method sure in diverting from the son that which fell to him by reason of his mother's intestacy. By special verdict the jury found that at the execution of the instrument offered for probate, the testatrix was of unsound mind and lacked testamentary capacity, but that the execution of said instrument was not procured through restraint, fraud or undue influence. *Held*, that the verdict was not so far against the weight of evidence as to indicate sympathy, passion or prejudice as its procuring cause, and therefore proponent's motion to set aside the verdict upon the issue of mental capacity will be denied and probate of the instrument refused because of the jury's finding that testatrix was mentally incapable of executing the instrument. The finding of the jury upon the other issues submitted was consistent with the finding upon the issue of testamentary capacity, and contestant's motion to set aside the verdict upon said other issues, on the ground that it was against the evidence and the weight of evidence and contrary to law, will also be denied. Matter of Matilda E. Burnham, 588.

9. *Construction of — When the gift is to a class it must be confined to the members of the class living at the date when the division is directed to be made — Contingent remainders.* Matter of Robert J. McKim, 720.

10. *Construction of — When remainder must be construed as a contingent gift to a class.* Matter of James B. Kissam, 724.

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WILLS — Continued.

11. *Contested probate — Verdict of jury, that deceased was of sound mind and of testamentary capacity but that the will was procured by undue influence, set aside — Burden of proof as to undue influence does not shift but remains on the party who asserts its existence — The inference of undue influence cannot be reasonably drawn from circumstances when they are not inconsistent with a contrary inference.* Matter of Theresa O'Brien, 728.

12. *Contested probate — Executors and administrators — Settlement agreement — Infants — Power of special guardian to enter into an agreement — Personal Property Law,* § 24 *— Code Civ. Pro.* § 2683. Matter of Maunsell B. Field, 733.

13. *Construction of — Harmonizing of intent and language into a valid disposition of the whole estate — When there is doubt whether to impute legality or illegality to a provision in a will it is the duty of the court to adopt that construction which prevents intestacy and which does not destroy the fundamental scheme of the whole will — Although testatrix omitted to mention what she bequeathed and devised to a certain charitable institution it will be held that she intended to give to it the remainder of her estate after certain life estates.* Matter of Sarah McGeehan, 737.

See **Executors and Administrators.**

WITNESSES.

Legislative committees — Right to delegate its power must be found in resolution — Sub-committee of one to investigate unauthorized — When witness not subject to punishment for contempt.— The power of a committee of the Legislature to delegate its power, if any such right exists, must be found in the express provision of the resolution pursuant to which the committee was appointed and may not be read into the resolution by judicial construction and interpretation. Where by a resolution of a committee to investigate, its chairman was appointed a committee of one to appoint sub-committees and not to investigate, a motion to punish, as for contempt, a witness duly subpoenaed before said chairman for refusing to be sworn before him, must be denied. The resolution of the Legislature appointing the committee of investigation could not and did not repeal section 61 of the Legislative Law which declares: "Whenever any standing committee of either house of the legislature shall be required to make an inquiry or investigation such committee may appoint a sub-committee of not less than three of its own members to make such investigation," etc., and the power to appoint sub-committees may not be delegated to an individual member of the whole committee. Matter of Leach, 660.

WORKMEN'S COMPENSATION LAW.

Workmen's Compensation Law, § 29 *— When awarding compensation is decisive and binding — Election.*— Under section 29 of the Workmen's Compensation Law, as amended in 1917, it is not the election to claim compensation thereunder but the actual awarding of it, which is decisive and binding. Godfrey v. Brooklyn Edison Co., 21.

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